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Taking Stock of Detainer Statutes

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*by Larry W. Yackle**

A detainer is a warrant or hold-order placed on a person already in custody to insure that the prisoner, upon completion of the term he is serving, will be available to the authority which filed the detainer. While penal and correctional methods and philosophies have moved far along the road of progress, this system has persistently and imperturbably plagued penal administrators, courts, and institutional personnel. Unnumbered times a detainer has proved the stumbling block to a law violator on his way to recovery.[1]

I. INTRODUCTION

To the outside world detainers are largely unknown. But behind the walls of American prisons they plague inmate and turnkey alike, and only recently has the legal system taken serious note of the situation.[2] While the detainer system affects most severely the inmates involved, detainers pose problems for correctional administrators[3] and the judiciary[4] as well. Recently, the Center for Criminal Justice at the Harvard Law School conducted an extensive investigation of the detainer system as it exists in Massachusetts.[5] The Harvard study identified four types of detainers: (1) detainers based upon outstanding criminal charges pending against the inmate; (2) detainers based upon sentences already imposed but to be served after the completion of the inmate's present sentence; (3) detainers based upon parole or

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1. *This Issue in Brief*, 9 FED. PROBATION, July-Sept., 1945, at 1.

2. The first published account of the detainer system appeared in 1945, when a leading sociological journal devoted almost an entire issue to it. *Id.*

3. Bennett, *The Correctional Administrator Views Detainers*, 9 FED. PROBATION, July-Sept., 1945, at 8.

4. Perry, *Effects of Detainers on Sentencing Policies*, 9 FED. PROBATION, July-Sept., 1945, at 11; *see* Reed v. Ciccone, 342 F. Supp. 648 (W.D. Mo. 1972).

5. Dauber, *Reforming the Detainer System: A Case Study*, 7 CRIM. L. BULL. 669 (1971) [hereinafter cited as Dauber]; see also L. Wenzell, Detainers: A National Survey and the Right to a Speedy Trial, Apr., 1969 (unpublished thesis in the Northwestern University Law School Library) [hereinafter cited as Wenzell].

probation revocation warrants; (4) detainers based upon miscellaneous legal proceedings.[6] By far the most significant detainers are those in the first category, those representing pending prosecutions. Nearly half the detainers examined by the Harvard researchers were of that type.[7] Indeed, of the approximately 23,700 detainers on file nationwide in 1969, sixty-nine percent were based upon outstanding criminal charges.[8] Not only are such detainers more common than those in the other three categories, but they present much more difficult problems for inmates, penal authorities, and the criminal justice system. Accordingly, this Article will be concerned only with detainers based upon untried charges.[9]

In recent years a body of literature has developed, examining detainers and appraising their effect upon inmates and the criminal justice system as a whole.[10] This Article will inquire into the relationship between the detainer system and the constitutional right to a speedy trial. Specifically, the Article will examine the uniform statutes that have been promulgated to deal with the problems associated with detainers. The thesis is that the detainer statutes were designed to resolve the administrative difficulties surrounding detainers, ignoring the constitutional implications. In view of the development of the right to a speedy trial in judicial decisions and legislative enactments, the constitutionality of the detainer statutes is questionable. The concluding section of this Article will propose remedial legislation to bring the procedure for handling outstanding charges pending against prison inmates into line with ordinary criminal process.

A. Uses of Detainers

Generally, a penal institution will recognize a detainer lodged by

6. Dauber, *supra* note 5, at 676.

7. *Id.* at 677.

8. Wenzell, *supra* note 5, at 3-4.

9. Detainers in the fourth category are limited in number and can, in most cases, be handled fairly and efficiently through administrative channels. Consecutive sentence and parole or probation revocation detainers pose the fundamental question of the extent to which an offender can or should be punished by incarceration. That issue will not be explored here. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.1(d) (Approved Draft 1968) (suggesting that in most cases the maximum authorized term for a single offense should be five years).

10. *E.g.*, Note, *The Detainer: A Problem in Interstate Criminal Administration*, 48 COLUM. L. REV. 1190 (1948) [hereinafter cited as *The Detainer*]; Note, *Detainers and the Correctional Process*, 1966 WASH. U.L.Q. 417 [hereinafter cited as *Detainers*].

any person who has authority to take the inmate into custody.[11] In most instances, the prosecutor charged with the task of bringing the case to disposition files the detainer,[12] but, if the case has not yet reached the stage of formal indictment or information, the detainer may be filed by the police[13] or the county sheriff.[14] In such cases, the detainer rests upon an arrest warrant,[15] a complaint,[16] or the mere desire on the part of the filing authority to interrogate the inmate.[17] It is hardly surprising, then, that little information about the underlying charge accompanies a detainer to the penal institution where the inmate is held. Detainers based upon process short of indictment or information lack even the reliability due a probable cause determination by a grand jury or inferior court.[18]

The problem is compounded by filing authorities' practice of lodging detainers with little consideration of whether or not the inmate will eventually be brought to trial. As the Harvard study pointed out, "[t]his is the detainer with the most uncertainty—it may never be acted upon or may be executed within days, weeks, years, or at the very end of the inmate's present sentence."[19] Indeed, only approximately half the detainers lodged against prison inmates are eventually acted upon.[20] In some cases, the filing authority may determine that further prosecution of the inmate is unwarranted and withdraw its detainer as a matter of prosecutorial discretion. In many instances, how-

11. *Detainers, supra* note 10, at 417-18.

12. *E.g.*, State v. Moore, 506 P.2d 242 (Ariz. 1973), *vacated, per curiam*, 414 U.S. 25 (1973).

13. *E.g.*, Commonwealth v. Hamilton, 297 A.2d 127 (Pa. 1972).

14. *E.g.*, Morris v. McGee, 180 N.W.2d 659 (N.D. 1970).

15. *E.g.*, Dodge v. People, 495 P.2d 213 (Colo. 1972).

16. *E.g.*, State v. Otero, 502 P.2d 763 (Kan. 1972).

17. Comment, *The Convict's Right to a Speedy Trial*, 61 J. CRIM. L.C. & P.S. 352, 353 (1970) [hereinafter cited as *Convict's Right*].

18. An arrest warrant must also be supported by probable cause, but typically a warrant issued prior to a preliminary hearing or grand jury action is less persuasive evidence that the inmate is seriously sought by the filing authority for trial on the underlying charge. An Iowa statute attempts to solve the problem by requiring that detainers based upon a complaint or arrest warrant must be followed up within six months by indictment or information. IOWA CODE ANN. § 247.5 (1969).

19. Dauber, *supra* note 5, at 677.

20. Wenzell, *supra* note 5, at 12-13. The Court of Appeals for the Tenth Circuit said, in Huston v. Kansas, 390 F.2d 156, 157 (10th Cir. 1968), that "[i]t is also common knowledge that relatively few detainers on federal inmates are followed by prosecution." Occasionally, a prosecutor can be forced to commit himself. *E.g.*, Taylor v. Virginia, 353 F. Supp. 1323 (W.D. Va. 1973) (federal habeas corpus relief granted when prosecutor declined to bring inmate to trial).

ever, detainers are maintained even when the filing authority has no intention of bringing about trial.[21] Accordingly, prison inmates may suffer the consequences of detainers that will never be executed, for, whether or not filing authorities take detainers seriously, penal authorities invariably do.

Even if a prosecutor intends to follow up a detainer with trial at some future date, he has ample reasons for delay. A detainer lodged against a potential defendant is a convenient short-term disposition of a pending case, operating to keep the prosecutor's books straight and his time free to handle other cases.[22] The prosecutor knows where the defendant is and knows that he cannot reach and prey upon the public during the period before trial. Thus a primary purpose of immediate action in a criminal case is mooted.[23] So long as the prosecutor is confident that his case will not become stale, and therefore less likely to bring a conviction, he may be content to adopt a waiting posture.

B. Effects of Detainers

A prison inmate against whom a detainer is lodged may suffer dire consequences within the penal institution where he is confined. A detainer represents the possibility of further prosecution and punishment at the end of the inmate's present term. Apparently on the theory that such a threat may prompt an inmate to attempt escape,[24] penal authorities often assign high custody classifications to inmates with detainers.[25] An inmate with a detainer may be denied institutional privileges resulting in decreased freedom of movement[26] and may be excluded from preferred living quarters such as dormitories.[27] Perhaps more importantly, such an inmate may be denied "trusty" status[28] or

21. Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493, 581-82 (1970) [hereinafter cited as Jacob & Sharma]. *See* Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 YALE L.J. 767, 772-73 (1968) [hereinafter cited as *Effective Guaranty*].

22. See United States v. Canty, 469 F.2d 114, 119 (D.C. Cir. 1972).

23. Comment, *The Detainer System and the Right to a Speedy Trial*, 31 U. CHI. L. REV. 535, 540 (1964) [hereinafter cited as *Detainer System*].

24. Dauber, *supra* note 5, at 692; but see Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U. CIN. L. REV. 179, 181 (1966) [hereinafter cited as Schindler] (indicating that other factors such as the probability of escape are not considered).

25. Schindler, *supra* note 24, at 181.

26. Jacob & Sharma, *supra* note 21, at 583.

27. *Id.*

28. *The Detainer, supra* note 10, at 1192.

may be considered ineligible to reside at an "honor farm"[29] or to take part in a "furlough" program.[30] Detainers may also be taken into account by parole boards and, therefore, may directly affect the length of an inmate's present term of imprisonment.[31] The effect of a detainer on a parole board's decision-making process varies among the states.[32] Although most boards view the existence of a detainer as a legitimate consideration, few take the position that a detainer is a bar to parole.[33] The most significant effect of a detainer upon a prison inmate is psychological, for, as one author pointed out,

> [t]he strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement.[34]

Thus a detainer may frustrate one of the arguable purposes of incarceration—rehabilitation.

A prison inmate may, as a result of a detainer lodged against him and the delay associated with it, suffer prejudice in the preparation of his defense. While the government has ample opportunity to investigate the case and to develop evidence,[35] the inmate in all probability is not represented by counsel.[36] Left to his own devices, the inmate may be unable to ascertain the nature of the charge and the surrounding circumstances.

Detainers not only cause difficulties for the inmates against whom they are lodged, but also pose problems that go to the core of the criminal justice system. First, inasmuch as a detainer has detrimental effects on the inmate before he is convicted of any new offense, one of the fundamental tenets of the system—the presumption of innocence—is put in jeopardy.[37] Second, prosecutorial delay in following up a

29. Schindler, *supra* note 24, at 181.

30. *Detainer System*, *supra* note 23, at 537; see Lawrence v. Blackwell, 298 F. Supp. 708, 713-14 (N.D. Ga. 1969).

31. Dauber, *supra* note 5, at 693-94; see United States *ex rel.* Giovengo v. Maroney, 194 F. Supp. 154 (W.D. Pa. 1961).

32. R. DAWSON, SENTENCING 283 (1969).

33. Wenzell, *supra* note 5, at 16.

34. Bennett, *"The Last Full Ounce,"* 23 FED. PROBATION, June, 1959, at 20-21 [hereinafter cited as Bennett].

35. Schindler, *supra* note 24, at 182.

36. See generally Jacob & Sharma, *supra* note 21.

37. Schindler, *supra* note 24, at 183. In order to make an inmate's sentence a little easier to bear, one commentator has argued that

detainer with trial on the underlying charge amounts to a usurpation of the court's sentencing power.[38] While it is true that a prosecutor makes daily decisions that affect the sentence a defendant is likely to receive upon conviction, his decision to delay an inmate's trial until the court no longer has the option to impose a concurrent sentence is something apart from what normally is considered proper use of discretion. Third, a prosecutor may scuttle the program of penal authorities by lodging a nuisance detainer. It has already been said that correctional institutions tend to accept a detainer at face value and that the effects that flow from it may be substantial.[39] Consequently, a prosecutor can see to it that an inmate is punished quite severely, even though he cannot be convicted of another offense. The filing of detainers that will be withdrawn just before the inmate's term expires apparently is not uncommon.[40] Quite clearly, however, the practice is an abuse of criminal process spawned by the detainer system.

II. THE DETAINER STATUTES

Various law reform groups have grappled with the detainer system and attempted to devise remedial administrative procedures and legislation to deal fairly and effectively with the problems that arise when a prison inmate faces an outstanding criminal charge. In a series of meetings held in 1955 and 1956, a committee of the Council of State Governments developed drafts of proposed legislation to deal with detainer matters. Two of the drafts were published in 1957 as part of the Council's suggested legislation for that year.[41] One of the proposals was revised slightly by the National Conference of Commissioners on Uniform State Laws and published as the Uniform Mandatory Disposition of Detainers Act.[42] The Uniform Act was intended to govern a criminal prosecution pending against an inmate in the ju-

> [i]n light of the important interest of the accused in a speedy trial, and since detainers have significant custodial effects, a prisoner subject to a detainer based on an outstanding charge should be given credit against any subsequent sentence that is based on that charge from the date of the filing of the detainer to the date of sentence.

Schornhorst, *Presentence Confinement and the Constitution: The Burial of Dead Time*, 23 HASTINGS L.J. 1041, 1086 (1972).

38. State v. Milner, 149 N.E.2d 189, 191 (Ohio C.P. Montgomery Co. 1958).

39. See text accompanying notes 24-36 *supra*.

40. Bennett, *supra* note 34, at 21.

41. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1957, at 77 (1956).

42. 9B UNIFORM LAWS ANN. (Supp. 1962); see also COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1959, at 167 (1958).

risdiction where he is confined. The Act, or a similar statute, is now part of the law of at least six states.[43] The other proposal, entitled the Agreement on Detainers, was designed to deal comprehensively with the perplexing problems that arise when an outstanding charge is pending in another jurisdiction. The Agreement was approved by the American Bar Association in 1962[44] and now has been enacted by at least forty states, the District of Columbia, and the federal government.[45] These two statutes are the primary subject matter of this Article. It will be argued that they raise serious constitutional questions that can only be resolved by remedial legislation.

A. The Uniform Mandatory Disposition of Detainers Act

According to the Council of State Governments, "[t]he basic purpose of the [uniform] act is to afford a means of permitting a prisoner

43. Letter from Leslie B. Turner, Administrative Assistant, National Conference of Commissioners on Uniform State Laws, to the author, Apr. 9, 1974. *See* CAL. PENAL CODE § 1381 (West 1972); COLO. REV. STAT. ANN. §§ 39-23-1—39-23-8 (Supp. 1969); IDAHO CODE §§ 19-5001—19-5008 (Supp. 1973); KAN. STAT. ANN. §§ 22-4301—22-4308 (Cum. Supp. 1972); MINN. STAT. ANN. § 629.292 (1974); MO. ANN. STAT. §§ 222.080-.150 (1962).

44. Resolution on the Agreement on Detainers, adopted by the House of Delegates of the American Bar Association in San Francisco, Aug. 6-10, 1962.

45. Letter from William L. Frederick, Director of the Criminal Justice Project of the Council of State Governments, to the author, October 23, 1973. *See* ARIZ. REV. STAT. ANN. § 31-481 (Supp. 1974), ARK. STAT. ANN. § 43-3201 (Cum. Supp. 1973); CAL. PENAL CODE § 1389 (West 1972); COLO. REV. STAT. ANN. § 74-17-1 (Supp. 1969); CONN. GEN. STAT. ANN. § 54-186 (1958); DEL. CODE ANN. tit. 11, §§ 2540-2550 (Supp. 1970); D.C. CODE ENCYCL. ANN. § 24-701 (Supp. 1974); FLA. STAT. ANN. § 941.45 (Supp. 1974); GA. CODE ANN. §§ 77-501b—77-510b (1973); HAWAII REV. STAT. § 714-1 (1968); IDAHO CODE § 19-5001 (Supp. 1973); ILL. ANN. STAT. ch. 38, § 1003-8-9 (Smith-Hurd 1973); IND. ANN. STAT. § 11-1-7-1 (1973); IOWA CODE ANN. § 759A.1 (Supp. 1974); KAN. STAT. ANN. § 22-4401 (Cum. Supp. 1972); ME. REV. STAT. ANN. tit. 34, §§ 1411-1419 (Supp. 1973); MD. ANN. CODE art. 27, §§ 616A-616J (1971); MASS. GEN. LAWS ANN. ch. 276 App., § 1-1 (1972); MICH. STAT. ANN. § 4.147(1) (1969); MINN. STAT. ANN. § 629.294 (1974); MO. STAT. ANN. § 222.160 (1974); MONT. REV. CODES ANN. § 95-3131 (Supp. 1974); NEB. REV. STAT. § 29-759 (1964); N.H. REV. STAT. ANN. § 606-A:1 (1973 Supp.); N.J. REV. STAT. § 2A:159A-1 (1971); N.M. STAT. ANN. § 41-20-19 (1972); N.Y. CRIM. PRO. LAW § 580.20 (McKinney 1971); N.C. GEN. STAT. § 148-89 (1974); N.D. CENT. CODE § 29-34-01 (1974); ORE. REV. STAT. § 135.775 (1973); PA. STAT. ANN. tit. 19, § 1431 (1964); S.C. CODE ANN. § 17-221 (Supp. 1973); S.D. CODE § 23-24A-1 (Supp. 1974); TENN. CODE ANN. § 40-3901 (Supp. 1974); 18 App. U.S.C. §§ 1-8 (1970); UTAH CODE ANN. § 77-65-4 (Supp. 1973); VT. STAT. ANN. tit. 28, § 1501 (1970); VA. CODE ANN. § 53-304.1 (1972); WASH. REV. CODE ANN. § 9.100.010 (Supp. 1973); W. VA. CODE ANN. § 62-14-1 (Supp. 1974); WIS. STAT. ANN. § 976.05 (1971); WYO. STAT. ANN. § 7-408.9 (Supp. 1973).

to clear up detainers which have been lodged against him."[46] The intent was to provide a mechanism by which an inmate can relieve himself of the burdens accompanying a detainer by prompting prosecution authorities to bring about a resolution of the underlying charge. As mentioned, the Act applies only if the outstanding charge is pending in the jurisdiction where the inmate is held.[47] The Act requires the official having custody of an inmate to promptly inform the prisoner of any untried criminal charges pending against him of which the custodian becomes aware. A prisoner who wishes to clear up an outstanding charge may request final disposition by delivering to the custodian a written request, addressed to both the court in which the prosecution is pending and the prosecuting officer who has responsibility for the case. The custodian must forthwith prepare a certificate explaining the inmate's status and must send copies of the request and the certificate to the court and the prosecutor to whom the request is addressed.[48] The prosecutor has ninety days after receipt of the request and certificate within which to bring the inmate to trial.[49] The court may grant a continuance on a showing of good cause made in open court with the inmate or his counsel present.[50] If the inmate is not brought to trial within ninety days (and no valid continuance is granted), the Act

46. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1959, at 167 (1958). See COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1957, at 76-77 (1956), where a note introducing the Council's first draft of an Intrastate Detainer Statute further explained its purpose as follows:

> It [the statute] gives him [the inmate] no greater opportunity to escape just convictions, but it does provide a way for him to test the substantiality of detainers placed against him and to secure final judgment on any indictments, informations or complaints outstanding against him in the state. The result is to permit the prisoner to secure a greater degree of knowledge of his own future and to make it possible for the prison authorities to provide better plans and programs for his treatment.

Id. at 76-77.

47. State v. Brann, 292 A.2d 173, 177 n.5 (Me. 1972). Similarly, the Act does not apply to an outstanding state charge pending against a federal prisoner, even if the inmate is held in a federal institution in the state where the prosecution is pending. State v. Morton, 436 P.2d 382 (Kan. 1968); Commonwealth v. Wagner, 289 A.2d 210 (Pa. Super. Ct. 1972).

48. If the prisoner addresses his request to the wrong prosecutor or court, or conceivably if the custodian misdirects the request, the Act will not be properly invoked and the prisoner may suffer the consequences. Brimer v. State, 402 P.2d 789 (Kan. 1965) (prisoner not entitled to relief because request delivered to wrong court).

49. Some states have adopted longer time periods. *E.g.*, KAN. STAT. ANN. § 22-4303 (Supp. 1972) (180 days); see State v. Goetz, 353 P.2d 816 (Kan. 1960).

50. *See* Chambers v. District Court, 504 P.2d 340 (Colo. 1972) (trial after 90 days had elapsed not barred because defense counsel agreed to the date at preliminary hearing).

withdraws the court's jurisdiction to entertain the case.[51] The indictment or information automatically loses force or effect, and the court must dismiss the prosecution with prejudice.[52]

B. *The Agreement on Detainers*

When the outstanding criminal charge underlying a detainer lodged against a prison inmate is pending in a different jurisdiction, difficult questions regarding comity between governmental units are presented.[53] Clearly, one state has no power to compel another state to deliver up a prison inmate for prosecution.[54] Nor can a state require the federal government to grant temporary custody of a federal prisoner to state officers, so that the inmate may be brought to trial in state court.[55] Similarly, a federal court cannot compel a state to give up custody of a state prisoner in order that he may be tried for a federal offense.[56] Thus disposition of the underlying charge must come

51. Thus the Act imposes a self-executing sanction. Commonwealth v. Bell, 276 A.2d 834 (Pa. 1971) (applying the Pennsylvania variant of the Act which sets a time period of 180 days); see also Commonwealth v. Klimek, 206 A.2d 381 (Pa. 1965).

52. State v. Goetz, 353 P.2d 816 (Kan. 1960).

53. See generally *The Detainer, supra* note 10.

54. This is true notwithstanding article four of the Constitution:

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2. In Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1860), the Supreme Court held that Congress has no power to compel the governor of a state to perform his moral duty under the Constitution and, therefore, declined to enforce either the constitutional provision or the implementing statute, leaving state executives de facto discretion to refuse delivery of a prisoner in appropriate circumstances. Kopelman, *Extradition and Rendition*, 14 B.U.L. REV. 591, 633-34 (1934); Note, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 YALE L.J. 97 (1956).

55. Ableman v. Booth, 62 U.S. (21 How.) 506 (1858); *cf.* Herbert v. Louisiana, 272 U.S. 312 (1926); *but see* McTyre v. Pearson, 435 F.2d 333, 335 (8th Cir. 1970), *cert. denied*, 402 U.S. 947 (1971) (noting that the Attorney General usually recognizes and honors writs of habeas corpus ad prosequendum issued by state courts).

56. *Cf. Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807). *Bollman* held that, under the version of the federal habeas corpus statute then in effect, the federal government could not interfere with state process once it had attached. Since *Bollman*, the habeas corpus statute has been amended so that it now permits a federal writ of habeas corpus to run against state process. 28 U.S.C. § 2241(c)(3) (1970). Still, there must be some constitutional violation to bring section 2241 into play. Clearly, habeas corpus cannot be used to seize a prisoner from lawful state custody solely for the purpose of trial on an outstanding federal indictment. *See Detainer System, supra* note 23, at 539. In such a situation, it may be argued that the state is violating the prisoner's right to a speedy trial. However, the argument is quite weak inasmuch as the duty to bring about trial lies with the federal government and not with the state.

through the cooperation of the jurisdictions affected.[57] The Agreement on Detainers is a legislative attempt to achieve just that cooperation.[58]

"The Agreement on Detainers applies the same principles embodied in the intrastate act to the interstate field."[59] Rather than deal with particular cases on an *ad hoc* basis with special contracts,[60] the Agreement purports to establish a general scheme for handling most cases swiftly and efficiently. The Agreement is organized into nine articles, the first,[61] third, fourth, and fifth of which are the most significant.[62]

Article III of the Agreement establishes an inmate's right to initiate the process by which a detainer and the underlying charge may be resolved. The person having custody of the inmate must promptly inform him of the source and contents of any detainer lodged against his release.[63] The custodian must also inform the inmate of his right

57. Although the states may not be compelled to deliver up fugitives on demand, it is clear that they are free to devise schemes for voluntary rendition. Dean, *The Interstate Compact—A Device for Crime Repression,* 1 LAW & CONTEMP. PROB. 460, 466-68 (1934). Indeed, most states have enacted the Uniform Criminal Extradition Act, *see* 9 UNIFORM LAWS ANN. 263-355 (1957), in order to settle the potential procedural problems involved. Similarly, the federal government has power to cooperate voluntarily with state authorities in order that a federal prisoner may be brought to trial in state court. *See* Ponzi v. Fessenden, 258 U.S. 254 (1922). In point of fact, the Congress has expressly approved such cooperation by statute. *See* 18 U.S.C. § 4085(a) (1970).

58. Success in the attempt to achieve this sought-after interjurisdictional cooperation may depend upon the adoption of the Agreement by the states which, thus far, have declined to do so. Most states which have faced the question have held that the Agreement is operative only when both states involved are members of the compact. *E.g.,* State v. Endres, 482 S.W.2d 480 (Mo. 1972) (prisoner not entitled to invoke the Agreement because receiving state not a compact member); State v. Cox, 505 P.2d 360 (Ore. Ct. App. 1973) (prisoner not entitled to invoke the Agreement because the sending state —the federal government—not a compact member); *compare* People v. Winfrey, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967) (state required to seek temporary custody of inmate even though sending state not a member of the compact).

59. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1957, at 78-85 (1956).

60. *E.g.,* Teets v. West Virginia, 322 F. Supp. 695 (N.D.W. Va. 1971); Morris v. McGee, 180 N.W.2d 659 (N.D. 1970).

61. Article I sets forth the purpose of the Agreement:

> [I]t is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.

AGREEMENT ON DETAINERS art. I.

62. Article II is the definition article. The term *state* is defined to include the United States and the District of Columbia. Article II further identifies the state where the prisoner is confined as the *sending* state and the state where the charge is pending as the *receiving* state.

63. Significantly, if a detainer is not lodged, the Agreement does not come into play. The Agreement imposes a duty on the custodian to notify the inmate of a charge out-

to request final disposition of the charge upon which the detainer is based. Upon receipt of a request, the custodian must promptly forward it to the appropriate prosecutor and court in the receiving state.[64] The request must be accompanied by a certificate similar to that prescribed in the Uniform Act.

The prisoner's written request has a number of effects. First, once the receiving state prosecutor and court receive the request, Article III imposes a duty on the receiving state to bring the inmate to trial within one hundred-eighty days. A continuance may be granted only upon a showing of good cause in open court with the inmate or his attorney present.[65]

Second, the request for disposition of any charge in the receiving state operates as a request for disposition of all outstanding charges pending there, which are represented by detainers lodged against the inmate. If other detainers representing other pending prosecutions have been filed, the custodian must notify all appropriate prosecutors and courts of the inmate's request and must enclose with the notice copies of the request and the certificate. Then, while the inmate is in their jurisdiction, those prosecutors must act to bring him to trial on the charges for which they have responsibility. If trial is not had on such a charge prior to the prisoner's return to the sending state, the

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standing against him only if the charge is represented by a detainer.

64. In People v. Esposito, 238 N.Y.S.2d 460 (Queens Co. Ct. 1960), the court said:

> Under the law [the Agreement]—and with the guidance of the Warden—the prisoner has to do but one thing. In accordance with the provisions of paragraph (b) of article III of the agreement his notice and request "shall be given or sent by the prisoner to the warden . . . or other official having custody of him." Otherwise, the burden of compliance with the requirements of the agreement is placed entirely upon the respective officials involved.

Id. at 467; *but see* State v. Brockington, 215 A.2d 362 (N.J. Super. Ct. 1965) (demand on prosecutor alone insufficient to set Agreement machinery in motion).

Nevertheless, the express language of Article III puts the burden on the prisoner to see that the correct prosecutor and court are notified. Such a burden seems unduly heavy in light of the obvious difficulties inmates experience in communicating by mail. *E.g.*, Procunier v. Martinez, 416 U.S. 396 (1974) (censorship); Hart v. State, 225 N.E.2d 676 (Ind. Ct. App. 1972) (prisoner sent request to wrong court). Moreover, it is simply unfair to hold the prisoner responsible for notifying the proper receiving state authorities when he must funnel his request through the custodian. Accordingly, in *Esposito* the court held that, if the custodian fails in his statutory duty to send the proper documents to the appropriate receiving state authorities, the adverse consequences should be visited upon the prosecution rather than the prisoner. 238 N.Y.S.2d at 468. *See* Pittman v. State, 301 A.2d 509 (Del. 1973); *but see* Baker v. Schubin, 339 N.Y.S.2d 360 (Sup. Ct. 1972) (prisoner held responsible for custodian's failure to send notice to prosecutor).

65. *But see* Commonwealth v. Martin, 282 A.2d 241 (Pa. 1971) (good-faith plea bargaining permitted delay beyond 180 days).

charge loses force or effect, and the court with jurisdiction of it must dismiss the case with prejudice.[66]

Third, the request waives extradition for purposes of serving any future sentence imposed upon the inmate. Thus a prisoner who sets in motion the Agreement's machinery by making a request under Article III simultaneously consents to be taken to the receiving state for trial, to be returned to the sending state to complete his present term, and then to be taken again to the receiving state to serve any new sentence imposed.[67]

Article IV of the Agreement authorizes a receiving state prosecutor, who has lodged a detainer against a prisoner confined in the sending state, to make a written request for temporary custody of the inmate in order that he may be brought to trial.[68] Upon receipt of such a request, the custodian must provide the prosecutor with a status certificate regarding the inmate. Here again, if other receiving state prosecutors have lodged detainers against the inmate, the custodian must notify them of the request made by the first prosecutor and the reasons for it.[69] Article IV measures the time within which the prisoner must

66. For examples of the complications which may arise in these circumstances, see State v. Lippolis, 244 A.2d 531 (N.J. Super. Ct. 1968), *aff'd*, 257 A.2d 705 (N.J. Super. Ct. 1969), *rev'd on other grounds*, 262 A.2d 203 (N.J. 1970), *petition for cert. denied*, 277 A.2d 884 (N.J. 1971); State v. Masselli, 202 A.2d 415 (N.J. 1964).

67. This presents a conflict with the Uniform Criminal Extradition Act, adopted in most states, which provides that an accused may waive his right to contest extradition only after a judicial hearing in which his rights are explained to him. 9 UNIFORM LAWS ANN. 263-365 (1957). *See* notes 69 & 210 *infra*.

68. Importantly, nothing in Article IV requires the prosecutor to make such a request. Under the Agreement, he has no obligation to bring about trial unless the inmate sets the machinery in motion by requesting final disposition pursuant to Article III. Of course, a prosecutor can avoid even that possibility simply by failing to lodge a detainer. See note 63 *supra*; *contra*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 3.1 (Approved Draft 1968).

69. Article IV recognizes that all prisoners sought by receiving state prosecutors under the Agreement need not be made available by the sending state. An express provision mandates a waiting period of thirty days after a request for temporary custody is received by the custodian before the request can be honored. One court has referred to the provision as "the 30-day waiting period required by the statute to permit a prisoner to contest his removal to the demanding [receiving] state." State v. Chirra, 191 A.2d 308, 309 (N.J. Super. Ct. 1963). Nevertheless, it is clear that Article IV departs from normal rendition procedure:

> If the state seeks trial on the indictment, the prosecutor does not have to follow the circuitous and cumbersome procedures which are necessary under the extradition laws. Under the Agreement, the governor of the indicting state is bypassed. The prosecutor's request goes directly to the official of the other state having custody of the prisoner, who apparently is not required to notify the governor of the request.

Note, *Convicts—The Right to a Speedy Trial and the New Detainer Statutes*, 18 RUT-

be brought to trial in the receiving state from the date of his arrival there.[70] Trial must be commenced within one hundred-twenty days after the prisoner arrives, unless a continuance is granted for good cause shown in open court with the inmate or his attorney in attendance.[71]

Article V of the Agreement establishes procedural machinery for implementing, and imposes sanctions for violating, Articles III and IV. In response to an inmate's request under Article III or a prosecutor's request under Article IV, the custodian must offer to deliver temporary custody of the prisoner to the receiving state. The grant of temporary custody is solely for the purpose of trial on charges underlying de-

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GERS L. REV. 828, 858 (1964) (footnote omitted) [hereinafter cited as *Convicts*].

During the thirty-day period, the sending state governor may disapprove the request, on his own or the prisoner's motion, and may decline to deliver the inmate up for trial. Importantly, Article IV does not require that the inmate be notified of the prosecutor's request for temporary custody or his right to petition the governor for an order denying the request. Of course, local regulations may specify that notice is to be given. *E.g.*, Kansas Governor's Extradition Manual 66 (1972). However, Article IV itself apparently contemplates that the governor will act *sua sponte*, if at all. While it is expressly provided that the governor may act in response to a motion from the prisoner, without notice of the request the inmate has no practical opportunity to make a timely motion. In order to avoid the arbitrary denial of a statutory right, due process may require that the inmate be notified of any request for temporary custody and his rights concerning it. *See* State *ex rel.* Garner v. Gray, 201 N.W.2d 163 (Wis. 1972).

If the governor fails to act within thirty days, the receiving state prosecutor must be granted temporary custody of the inmate. The prisoner has no right to demand that the governor affirmatively order his delivery to the receiving state; he can only seek an order refusing such delivery. Thus the Agreement itself suffices for consent to temporary custody in most cases without the need for affirmative action, and only if the sending state governor steps in to exercise his power to refuse delivery is temporary custody denied. This is, of course, just the opposite of traditional interstate rendition law. Ordinarily, a fugitive from justice in another state can be delivered only upon the authority of a governor's warrant issued by the executive in the state where the prisoner is held. That is, affirmative action is necessary. Uniform Criminal Extradition Act, 9 UNIFORM LAWS ANN. 263-355 (1957). Under Article IV of the Agreement, however, affirmative action is not required and, in the normal case, the prisoner may be delivered to the receiving state after the thirty-day period has expired without action by the governor.

70. At least one court has taken the view that the prisoner must be transported to the receiving state within a reasonable time after the prosecutor makes a request for temporary custody:

> [T]he statute [Agreement on Detainers] impels the determination that when the prosecuting officials of a party state request temporary custody of a prisoner in another party state for trial, they must continue their effort to obtain delivery of the prisoner from the other state with all reasonable diligence and dispatch.

State v. Chirra, 191 A.2d 308, 312 (N.J. Super. Ct. 1963).

71. People v. White, 305 N.Y.S.2d 875, 878 (App. Div. 1969) (motion to suppress evidence filed *after* 120 days had elapsed but before motion to dismiss held to be a waiver).

tainers or charges arising out of the same transaction. At the earliest practicable time, consonant with effectuating the Agreement's purpose, the inmate must be returned to the sending state to continue serving his present sentence.

The crux of Article V is its sanction section. Section (c) provides that if (1) the receiving state refuses or fails to accept temporary custody of the inmate,[72] or (2) trial is not commenced under Article III within one hundred-eighty days and any valid continuance after receipt of a prisoner's request,[73] or (3) trial is not commenced under Article IV within one hundred-twenty days and any valid continuance after the prisoner's arrival in the receiving state,[74] then the receiving state court having jurisdiction of the prosecution must dismiss the indictment, information, or complaint with prejudice.[75] Furthermore, any detainer based upon the charge ceases to have force or effect. Thus the sanction is severe, cutting off prosecution altogether if the receiving state frustrates the purpose of the Agreement by failing to comply with its mandatory terms.[76]

III. The Right to a Speedy Trial

A. Development in State Courts

Efforts to deal with the problems associated with detainers must be viewed against a background of the development of the right to a

72. *E.g.*, State v. Chirra, 191 A.2d 308 (N.J. Super. Ct. 1963).

73. *E.g.*, Hoss v. State, 292 A.2d 48 (Md. 1972).

74. People v. Esposito, 238 N.Y.S.2d 460 (Queens Co. Ct. 1960) (dictum).

75. It is the court in the receiving state that is to dismiss the charge. State v. West, 191 A.2d 758 (N.J. Super. Ct. 1963). A court in the sending state lacks power to affect a pending prosecution in the receiving state directly but may validly issue an order expunging a detainer from a prisoner's prison records. *See* Baker v. Schubin, 339 N.Y.S.2d 360 (Sup. Ct. 1972).

76. It should be noted that, although the Uniform Act withdraws jurisdiction to entertain a prosecution after the statutory time period has elapsed and thus imposes a self-executing sanction (see note 51 *supra*), the Agreement does not go so far. Article V merely requires the court to dismiss with prejudice. While the issue is not free from doubt, apparently the prisoner must move for dismissal. State v. West, 191 A.2d 758 (N.J. Super. Ct. 1963). The distinction may have dire consequences. In State v. Mason, 218 A.2d 158 (N.J. Super. Ct. 1966), the court held that a continuance may be granted only if the state makes a showing of good cause before the 180-day period expires. But in State v. Lippolis, 262 A.2d 203 (N.J. 1970), the court rejected *Mason* and held that, so long as the state moves for a continuance and makes a showing of good cause before the court dismisses the prosecution, a continuance may be validly granted. Thus the effect of requiring the inmate to move the court for dismissal under Article V of the Agreement is to enlarge the time period within which the state may seek a continuance.

speedy trial. Prior to the last decade, the state's responsibility to bring about trial of an accused already in prison serving a sentence imposed for another offense was seen as different from its responsibility toward defendants released on bond or held in jail pending trial. Although most state constitutions include speedy trial provisions,[77] many courts that considered the issue held that a prison inmate was not entitled to the right.[78] The theory was that the right to a speedy trial protects the defendant from prolonged pre-trial confinement and the accompanying anxiety and embarrassment to reputation. A prison inmate was thought to suffer none of these difficulties. Particularly if the inmate-defendant was confined in another jurisdiction, courts consistently held that trial could be delayed until the expiration of the prisoner's present term.[79]

Perhaps in response to the criticism levelled against the majority rule, a few courts came to the conclusion that a state must make a reasonable effort to obtain custody of a prison inmate confined in another jurisdiction, in order that he may be brought to trial.[80] The minority view became that, although the state having custody of the inmate may decline to cooperate, nevertheless the state wishing to prosecute has a responsibility to at least attempt to have the case tried expeditiously. A reasonable request addressed to the state where the prisoner is held was considered a first and necessary step in meeting that responsibility.

B. Development in the Supreme Court— The Sixth Amendment

In 1967, the complexion of the law regarding speedy trial for prison inmates changed dramatically with the Supreme Court's decision in *Klopfer v. North Carolina*[81] that the speedy trial guarantee of the sixth amendment[82] is applicable to the states.[83] Although *Klopfer* in-

77. See L. KATZ, JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 247-365 (1972) [hereinafter cited as KATZ].

78. *E.g.*, Cooper v. Texas, 400 S.W.2d 890, 892 (Tex. 1966). Many courts, however, extended the right to prisoners confined in local institutions. *E.g.*, Rader v. People, 334 P.2d 437 (Colo. 1959); Hottle v. District Court, 11 N.W.2d 30 (Iowa 1943).

79. *Effective Guaranty, supra* note 21, at 769-71.

80. *E.g.*, People v. Winfrey, 228 N.E.2d 808, 281 N.Y.S.2d 823 (1967); Barker v. Municipal Court, 64 Cal. 2d 806, 415 P.2d 809, 51 Cal. Rptr. 921 (1966); Commonwealth v. McGrath, 205 N.E.2d 710 (Mass. 1965); People v. Bryarly, 178 N.E.2d 326 (Ill. 1961).

81. 386 U.S. 213 (1967).

82. The sixth amendment provides, in pertinent part, as follows:

volved a defendant free on his own recognizance pending reinstitution of a criminal prosecution, the Court's reasoning reached any case in which trial is delayed in violation of the sixth amendment. Significantly, the Court emphasized, as constitutionally protected interests, forms of oppression that arise even if the accused is already in prison serving a sentence for an unrelated offense.[84] The *Klopfer* opinion clearly foreshadowed an extension of the federal constitutional right to a speedy trial to prison inmates.

Although a requirement that a prisoner confined in a local institution be afforded a speedy trial offered no insurmountable difficulties,[85] the extent of the state's responsibility to an inmate-defendant confined in another jurisdiction was altogether unclear. Even after *Klopfer* most state courts took the position that trial in such a case may be delayed until the expiration of the inmate's present term.[86] Then, in *Smith v. Hooey*,[87] the Supreme Court took a different view. The Court rea-

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .

U.S. CONST. amend. VI.

83. Writing for the Court, the Chief Justice said that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment," and that, consequently, the federal provision applies to the states through the fourteenth amendment. 386 U.S. at 222-23.

In a concurring opinion, Mr. Justice Harlan argued that the theory that the fourteenth amendment " 'incorporates' or 'absorbs' *as such* all or some of the specific provisions of the Bill of Rights" is unsound constitutional doctrine. *Id.* at 226. He would have rested the Court's result in *Klopfer* on a fundamental fairness notion derived from the due process clause.

The difference between the Chief Justice and Justice Harlan only revived the perennial controversy over the proper interpretation of the fourteenth amendment. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Adamson v. California, 332 U.S. 46 (1947). Whether one school of thought has ever had the best of that debate is still an interesting theoretical question. On a practical level, however, the adoption by the *Klopfer* Court of the view that the sixth amendment itself is applicable to the states may have significance. Presumably, *Klopfer* held that state proceedings are governed by the standards developed by the federal courts for federal criminal proceedings. That is, *Klopfer* made all the federal cases decided under the sixth amendment equally binding upon the states. On the other hand, if the Court had adopted Justice Harlan's due process theory, the states might have been left with more leeway within which to develop their own standards. New practices would clearly have been required to be fundamentally fair, but arguably they might have been less stringent than those followed by the federal courts. As it is, the federal question whether a defendant's right to a speedy trial has been denied is the same whether the case arises in state or federal court.

84. 386 U.S. at 222, *quoting* United States v. Ewell, 383 U.S. 116, 120 (1966).

85. See *Convict's Right, supra* note 17, at 356.

86. See the discussion in Commonwealth v. Clark, 279 A.2d 41 (Pa. 1971). There were notable exceptions. *E.g.*, Pitts v. North Carolina, 395 F.2d 182 (4th Cir. 1968).

87. 393 U.S. 374 (1969).

soned that a prison inmate suffers from pre-trial delay just as any other accused does and, accordingly, the speedy trial right extends to him wherever he is held:

> Suffice it to remember that this constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: "[1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself." . . . These demands are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction.[88]

Thus the Court held that, "[u]pon the petitioner's demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the Harris County court for trial."[89]

Smith v. Hooey left open the question whether Texas was required to dismiss the indictment. In a subsequent case, the Court discussed but still did not resolve the problem. In *Dickey v. Florida*,[90] in response to a demand, a prison inmate had been returned from federal prison and tried for robbery after a delay of eight years. The Court apparently found no constitutional bar to the trial itself, but reversed the conviction on the ground that the accused had made an impressive showing of prejudice to his defense. Thus the Court implied, but did not squarely decide, that a finding of prejudice, going to the defendant's ability to defend himself, is a necessary element for a determination that the right to a speedy trial has been denied. That view was widely held until only recently.[91] Perhaps more importantly, *Dickey*,

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88. *Id.* at 377-78 (footnote omitted), *quoting* United States v. Ewell, 383 U.S. 116, 120 (1966); *accord*, Arrowsmith v. State, 175 S.W. 545, 546-47 (Tenn. 1915).

89. 393 U.S. at 382-83; *cf.* Barber v. Page, 390 U.S. 719 (1968); *see* Teets v. West Virginia, 322 F. Supp. 695 (N.D.W. Va. 1971); Hadlock v. State, 478 P.2d 295 (Idaho 1970) (the effort need not be successful). Although they recognized that change seemed in the wind, the lower courts emphasized the requirement that the inmate demand trial as did the prisoner in *Smith*. *See* Short v. Cardwell, 444 F.2d 1368 (6th Cir. 1971); *cf.* Edmaiston v. Neil, 452 F.2d 494, 500 (6th Cir. 1971) (where the demand requirement was mitigated because the state failed to indict the defendant).

90. 398 U.S. 30 (1970).

91. *E.g.*, United States v. Key, 458 F.2d 1189 (10th Cir.), *cert. denied*, 408 U.S. 927 (1972); United States v. King, 431 F.2d 734 (5th Cir. 1970); *cf.* United States v. Marion, 404 U.S. 307 (1971). In Barker v. Wingo, 407 U.S. 514 (1972) (see text accompanying notes 99-114 *infra*), however, the Court said that prejudice is only one of several factors which must be considered when an accused raises a speedy trial claim. And in Moore v. Arizona, 414 U.S. 25 (1973), the Court expressly held that prejudice is not an essential element of a successful claim.

like *Smith v. Hooey*, involved an inmate who had demanded trial, and the Court again seemed to assume that a demand for trial is necessary before a criminal defendant can complain of delay.[92]

The next speedy trial case to reach the Supreme Court was *United States v. Marion*.[93] In that case, the defendants had been charged with fraud in connection with the operation of a home improvement business. They contended that a three-year delay between the first act covered by the charge and the issuance of the indictment constituted a denial of their right to a speedy trial. The Court rejected that argument, however, and held that "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused.' "[94] A defendant's right to a speedy trial attaches when he is formally charged or when he is taken into custody and held to answer.[95] A defendant already in prison becomes an accused at least when a detainer is lodged against him.[96] Prior to that critical point, his right against delay is governed by the applicable statute of limitations[97] or the due process clauses.[98]

Finally, in *Barker v. Wingo*,[99] the Court attempted to deal thoroughly with all aspects of the right to a speedy trial. *Barker* took note of three ways in which the right differs from other constitutional guar-

92. Inasmuch as both *Dickey* and *Smith v. Hooey* involved prisoners who had made demands, the precise question whether a demand for trial was necessary was not presented, and any language in the opinions suggesting approval of the demand-waiver doctrine must be considered dicta. See note 89 *supra*.

93. 404 U.S. 307 (1971).

94. *Id.* at 313.

95. See United States v. Hanna, 347 F. Supp. 1010, 1012 n.2 (D. Del. 1972). Of course, the arrest must be in connection with the same charge. United States v. DeTienne, 468 F.2d 151, 155 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973).

96. Dodge v. People, 495 P.2d 213 (Colo. 1972); Commonwealth v. Hamilton, 297 A.2d 127 (Pa. 1972); see United States v. Simmons, 338 F.2d 804, 807 (2d Cir. 1964). However, the *Marion* Court made clear that, if a formal charge is made prior to the time at which a detainer is lodged, the sixth amendment should come into play at the time of that formal charge. 404 U.S. at 320.

97. *But see* notes 139 & 222 *infra*.

98. *Cf.* Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965); see generally Robinson v. United States, 459 F.2d 847 (D.C. Cir. 1972). In *Marion*, the government conceded that due process would require dismissal "if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellee's rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324. Generally, *Marion* has been read to permit substantial pre-charge delay, particularly in complex cases. *E.g.*, United States v. Stein, 456 F.2d 844, 848 (2d Cir.), *cert. denied*, 408 U.S. 922 (1972) (securities fraud prosecution); United States v. Brown, 354 F. Supp. 1000 (E.D. Pa. 1973) (mail theft).

99. 407 U.S. 514 (1972).

antees. First, not only the accused but also society has an interest in seeing that a criminal prosecution is not unduly delayed. A defendant released on bond prior to trial has an opportunity to commit other offenses or to flee from justice. In addition, pre-trial confinement of defendants unable to make bail is often brutal, destructive of character, and costly.[100] Second, the right to a speedy trial is unique in that delay may well work to the defendant's advantage. Quite often the defense may want to delay proceedings, hoping that the prosecution's case will be weakened by disappearing witnesses or that, at the very least, stale evidence will be less persuasive at trial. Accordingly, "unlike the right to counsel . . . , deprivation of the right to a speedy trial does not *per se* prejudice the accused's ability to defend himself."[101] Third, the right to a speedy trial is imprecise. "It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate."[102]

Next, the Court dealt with "two rigid approaches" urged by the parties as "ways of eliminating some of the uncertainty which courts experience in protecting the right."[103] Counsel for Barker argued that the Court should interpret the sixth amendment as requiring that a criminal defendant be offered a trial within a fixed time period after arrest or formal charge.[104] While recognizing the appeal of that approach and the existence of state statutes and rules which accomplish the same result, the Court declined "to engage in legislative or rule-making activity, rather than the adjudicative process . . . ."[105] To the contrary, the Court held flatly that there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months."[106] Of course, the states and the federal

100. *Id.* at 520.

101. *Id.* at 521.

102. *Id*; see Beavers v. Haubert, 198 U.S. 77, 87 (1905) (right to a speedy trial is "consistent with delays and depends upon circumstances"). Additionally, the *Barker* Court noted that the uncertainty surrounding the right to a speedy trial leads to dismissal as an "unsatisfactorily severe remedy." 407 U.S. at 522. While complaining that dismissal is a more serious remedy than the exclusionary rule or a reversal and order for a new trial, the Court said that it nevertheless is "the only possible remedy." *Id.* Subsequently, the Court reiterated that view in Strunk v. United States, 412 U.S. 434 (1973).

103. 407 U.S. at 522-23.

104. An amicus curiae brief by the Lawyers' Committee for Civil Rights Under Law argued forcefully that the framers intended the sixth amendment to require trial within six months after an accused is held to answer.

105. 407 U.S. at 523.

106. *Id.* This holding has received good marks in the literature. *See, e.g., The Su-*

government are free to enact statutes, and courts may promulgate rules, that protect the constitutional right to a speedy trial.[107] However, the Court concluded that the sixth amendment itself is less precise.

The state contended, and the court below held, that an accused may complain of a denial of his right to a speedy trial only if he demanded trial during the period of delay. Thus the Court was urged to embrace the "demand-waiver doctrine," the well-entrenched[108] but much-maligned[109] rule that a defendant waives his right to a speedy trial for any period prior to a demand for trial. The Court, rejecting this approach, viewed the doctrine as inconsistent with its position on the waiver of other constitutional rights[110] and repeated the general rule that waiver of a constitutional right cannot be presumed from a silent record.[111] The demand-waiver doctrine impermissibly assumes that the defendant's failure to demand trial is a reasoned, tactical choice. That, of course, is not always true. It is just as likely that the accused is disadvantaged by delay and wants his day in court as soon as possible. Moreover, the doctrine puts defense counsel in the untenable position of moving for a speedy trial when, in fact, he would prefer a reasonable continuance. The demand must be made immediately in order to protect the defendant's right should the prosecution fail at a later time to bring the case to trial. Perhaps the principal shortcoming of the doctrine is that it places the burden of protecting the right solely upon the accused. The Court made it clear that the Constitution provides otherwise.[112]

Nevertheless, the Court concluded that a defendant's failure to demand trial is not irrelevant. In recognition of the uniqueness of the speedy trial right, particularly its imprecision and the possibility that

preme Court, 1971 Term, 86 HARV. L. REV. 52, 164, 167-69 (1972). However, the contrary view is not without support. *See, e.g.*, United States v. Dunn, 459 F.2d 1115 (D.C. Cir. 1972) (Tamm, J.).

107. The Court was at pains to make this clear, pointing particularly to the local rules adopted in the Second Circuit. 407 U.S. at 523; see Comment, *Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, 71 COLUM. L. REV. 1059 (1971).

108. The Court recognized that every federal circuit and most states adhered to the rule. 407 U.S. at 524.

109. *E.g.*, Cohen, *Speedy Trial for Convicts: A Reexamination of the Demand Rule*, 3 VALPARAISO U.L. REV. 197 (1969); *Convict's Right, supra* note 17, at 360-63.

110. 407 U.S. at 525; *see* Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587, 1609-10 (1965).

111. 407 U.S. at 525-26; *accord*, Carnley v. Cochran, 369 U.S. 506, 516 (1962).

112. 407 U.S. at 527.

delay may actually benefit the accused, the Court held that "the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right."[113] Going further, the Court adopted an *ad hoc* balancing test to be applied on a case-by-case basis whenever a denial of the right to a speedy trial is in issue. Four related factors must be weighed: (1) the length of delay; (2) the reason for it; (3) the defendant's assertion of or failure to assert his right; and (4) the existence or absence of prejudice to the accused.[114]

C. *State Implementing Legislation*

Just as the courts have been active in the development of speedy trial doctrine in recent years, state legislatures have exhibited an interest in enacting laws that serve to implement the constitutional guarantee.[115] As a general proposition, it seems beyond argument that state legislatures are free to adopt measures that bear upon constitutional issues. There is no reason to suppose that fluid constitutional provisions forever occupy the fields they touch upon, to the exclusion of ordinary statutory regulation. Indeed, the Supreme Court made it clear in the *Barker* case that the states may enact valid statutes that effectu-

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113. *Id.* at 528.

114. For an examination of *Barker*, see Uviller, *Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1382-91 (1972).

115. The discussion here is limited to state legislation. Although a number of bills have been introduced in the Congress, the federal government has not yet adopted legislation to effectuate the right to a speedy trial. Outside the sixth amendment itself and occasional local rules, the only federal law on point is rule 48(b) of the Federal Rules of Criminal Procedure:

> If there is unnecessary delay in presenting the charge to the grand jury or in filing an information against a defendant who has been held to answer in the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information, or complaint.

FED. R. CRIM. P. 48(b).

Rule 48(b) implements the constitutional right to a speedy trial and the court's inherent power to dismiss for want of prosecution. Pollard v. United States, 352 U.S. 354, 361 n.7 (1957). The rule necessarily contemplates that an indictment valid under the applicable statute of limitations may be dismissed, United States v. Rutkowski, 337 F. Supp. 340, 341 (E.D. Pa. 1971), and permits dismissal of a criminal charge even though there has been no violation of the sixth amendment right to a speedy trial. Mathies v. United States, 374 F.2d 312, 314-15 (D.C. Cir. 1967); United States v. McKee, 332 F. Supp. 823, 826 (D. Wyo. 1971). Importantly, however, the rule is expressed entirely in terms of the trial court's discretion. Consequently, it has never been a significant safeguard against pre-trial delay. Still, some states have copied it. *E.g.*, ALAS. R. CRIM. P. 43(b); HAWAII R. CRIM. P. 48(b); see State v. Fischer, 285 A.2d 417 (Del. 1971).

ate the right to a speedy trial.[116] Accordingly, the American Bar Association has recommended[117] and most states have adopted[118] statutes or rules that implement the state and federal constitutional requirements. These statutes and rules reflect sound legislative thinking, formulated from a broad social policy perspective. They indicate a collective judgment that the interests of the public and the accused can only be served if the constitutional right to a speedy trial is adequately protected and that a fixed time period within which trial must be had is necessary to achieve that end.[119]

While the state speedy trial statutes are similar in that they all establish a fixed time limit for the commencement of criminal trials, in other respects they vary in approach. Some older statutes purport to require the accused to demand trial and measure the statutory time period from the date of the demand.[120] Newer statutes make no mention of a demand but measure the time within which trial must be commenced from a specified stage in the criminal process. A few statutes focus on the arraignment,[121] but the most common choice is the time of arrest[122] or, if a formal charge is made before arrest, the time of the indictment, information, or complaint.[123] Some statutes express the time period in court terms,[124] but most employ a set number of days, usually one hundred-eighty[125] or sixty days.[126]

Additionally, speedy trial statutes are conceived of differently in the various jurisdictions. Some statutes are considered a legislative definition of the constitutional right to a speedy trial, and courts in those jurisdictions view the fixed time limits established by the statutes as co-

116. 407 U.S. at 523.

117. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 2.1 (Approved Draft 1968).

118. See KATZ, *supra* note 77; Note, *Speedy Trial Schemes and Criminal Justice Delay*, 57 CORNELL L. REV. 794 (1972).

119. *Cf.* United States *ex rel.* Frizer v. McMann, 437 F.2d 1312 (2d Cir. 1971).

120. *E.g.*, N.C. GEN. STAT. § 15-10 (1965); WIS. STAT. ANN. § 971.10(2)(a) (1971).

121. *E.g.*, CAL. PENAL CODE § 1382(3) (West Supp. 1974); KAN. STAT. ANN. § 22-3402 (Supp. 1973).

122. *E.g.*, FLA. R. CRIM. P. 1.191(a)(1); ILL. STAT. ANN. ch. 38, § 103-5(a) (Smith-Hurd 1970).

123. *E.g.*, WASH. REV. CODE ANN. § 10.46.010 (1961); W. VA. CODE ANN. § 62-3-21 (1966).

124. *E.g.*, ARK. STAT. ANN. § 43-1708 (1964); GA. CODE ANN. § 27-1901 (1972).

125. *E.g.*, NEB. REV. STAT. § 29-1207 (Supp. 1972); N.M. STAT. ANN. §§ 41-20-19—41-20-23 (Supp. 1972).

126. *E.g.*, IOWA CODE ANN. § 795.2 (Supp. 1974); NEV. REV. STAT. §§ 178.556-.562 (1) (1971).

extensive with the maximum allowable delay under the constitutional standard. The result is that a violation of such a statute is taken to be a violation of the defendant's constitutional right to a speedy trial as well.[127] On the other hand, some jurisdictions consider their speedy trial statutes as distinct from the constitutional guarantee. Therefore, so long as the statute is applicable and enforced in a given case, no constitutional issue need be resolved. The statute imposes a more stringent standard upon the prosecutor than does the constitutional guarantee, and that standard is controlling.[128]

IV. THE CONSTITUTIONALITY OF THE DETAINER STATUTES

It remains to place the detainer statutes in their appropriate position in this scheme of the development of the right to a speedy trial in judicial decisions and legislative enactments. In 1957, when the detainer statutes were drafted and first published, a prison inmate's constitutional right to a speedy trial had not yet been clearly established.[129] Although the preamble to the Agreement on Detainers refers vaguely to the "difficulties in securing speedy trial of persons already incarcerated,"[130] neither the Agreement nor the Uniform Mandatory Disposition of Detainers Act was designed to protect any *constitutional* right of prison inmates. Quite the contrary, the draftsmen assumed that the Constitution had nothing to say on the matter. The problems associated with detainers were seen as administrative,[131] involving substantial difficulties for inmates but not rising to constitutional significance.

Now, however, it is clear that the detainer statutes do affect constitutional rights, and cases can be imagined in which they may interfere with the constitutional right to a speedy trial.[132] Additionally, inasmuch as the right to a speedy trial has now been extended to prison inmates, the detainer statutes must be compared with general statutes

127. *E.g.*, Flanary v. Commonwealth, 35 S.E.2d 135 (Va. 1945).

128. *E.g.*, People v. Stuckey, 216 N.E.2d 785, 786 (Ill. 1966).

129. Klopfer v. North Carolina, 386 U.S. 213 (1967), extending the reach of the sixth amendment to the states, was not decided for another decade. Even then, the question whether a prison inmate was entitled to the right was unclear until the Supreme Court's opinion two years later in Smith v. Hooey, 393 U.S. 374 (1969).

130. AGREEMENT ON DETAINERS art. I.

131. See text accompanying notes 46 & 59 *supra*; *contra*, Hoss v. State, 292 A.2d 48 (Md. 1972).

132. See notes 133-59 *infra* and accompanying text; see generally notes 77-114 *supra* and accompanying text.

designed to implement that right. To the extent the detainer statutes depart unreasonably from the general speedy trial statutes, grave equal protection questions are raised. Therefore, state legislatures have a responsibility to analyze the detainer statutes in constitutional terms. Such an examination will reveal that the detainer statutes represent an understandable but nonetheless clear legislative error, particularly for those states that have enacted the statutes in the mistaken belief that they will do what they were never intended to do—protect prison inmates' right to a speedy trial.

A. The Speedy Trial Challenge

1. The Pre-*Barker* Argument

As the right to a speedy trial began to take shape in the Supreme Court's decisions from *Klopfer v. North Carolina*[133] to *Smith v. Hooey*[134] and *Dickey v. Florida*,[135] the commentators laid the detainer statutes next to the new constitutional doctrine and identified the inconsistencies.[136] Principally, it was pointed out that neither statute purports to cover all cases. The Uniform Act requires the custodian to notify the inmate of any outstanding charge of which he has knowledge or notice, thus affording the prisoner an opportunity to invoke the Act to bring about final disposition. However, nothing in the Act protects the inmate from delay in the prosecution of a charge of which the custodian is unaware. The Act places no duty on the prosecutor concerned to notify the custodian or the inmate of the existence of an accusation.[137] In a like manner, the Agreement on Detainers, while failing to require action on the part of the prosecutor, expressly limits its own application to cases in which a detainer is filed.[138] Clearly, the Agreement proceeds on the assumption that the prosecutor has no constitutional responsibility to the accused inmate and that it would be inappropriate or unworkable to impose a statutory obligation upon him. Since the objective is to ameliorate the difficulties flowing from

133. 386 U.S. 213 (1967).

134. 393 U.S. 374 (1969).

135. 398 U.S. 30 (1970).

136. *See, e.g.*, Walther, *Detainer Warrants and the Speedy Trial Provision*, 46 MARQ. L. REV. 423 (1963) (surveying cases prior to *Klopfer* and *Smith*); Note, *The Interstate Criminal Detainer and the Sixth Amendment*, 23 ARK. L. REV. 634 (1970) (surveying cases since *Smith*).

137. *Convicts*, *supra* note 69, at 859.

138. See *Effective Guaranty*, *supra* note 21, at 775; note 63 *supra*.

detainers, the Agreement does not come into play in a case in which the prosecutor fails to contact the institution.[139]

Notwithstanding their substantial shortcomings, the detainer statutes have received strong and consistent support from both the cases and the commentators. Deficiencies have been identified, but suggestions from critics have centered on recommendations for salutary interpretation[140] or, in some cases, piecemeal amendment.[141] The most sweeping suggestion has come from the American Bar Association Project on Minimum Standards for Criminal Justice. A special standard takes account of the detainer statutes' failure to require the prosecutor to lodge a detainer so as to invoke the applicable detainer statute. Thus the standard requires a prosecutor who knows that "a person charged with a criminal offense is serving a term of imprisonment in a penal institution of that or another jurisdiction," to obtain "the presence of the prisoner for trial," or to file a detainer "with the official having custody of the prisoner."[142] If the prosecutor chooses only to lodge a detainer and thus warn the inmate of a possible trial

139. It is also important to note that neither statute deals with delay prior to formal charge. Each applies only if an untried indictment, information, or complaint is outstanding. Accordingly, even though delay prior to the stage of formal accusation may be quite detrimental to the inmate concerned, the statutes offer no protection. The prosecutor may well delay a complaint or even the issuance of an arrest warrant and thus avoid warning the inmate of his peril. Generally, in cases traversing state boundaries, the applicable statute of limitations is tolled while the accused is absent from the state and considered a fugitive. Taylor v. United States, 238 F.2d 259 (D.C. Cir. 1956); Note, *The Statute of Limitations: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630 (1954); *Effective Guaranty, supra* note 21, at 780. Additionally, it has been pointed out that neither of the detainer statutes adequately assures that the custodian will fulfill his responsibilities. *Convicts, supra* note 69, at 860-63; see notes 48 & 64 *supra*. Nor does the Agreement satisfactorily protect the inmate against failure of the receiving state to follow through on its commitment to accept temporary custody. See note 70 *supra*. There is some support for the view that a failure to *grant* temporary custody would raise a federal question cognizable on federal habeas corpus. *See* May v. Georgia, 409 F.2d 203, 205 n.5 (5th Cir. 1969) (dictum); 49 NEB. L. REV. 166, 175 (1969). Finally, some of the provisions of the detainer statutes are vague or ambiguous so that the proper interpretation is difficult to ascertain. *E.g.*, notes 66, 69, & 76 *supra*.

140. *E.g.*, State v. Chirra, 191 A.2d 308 (N.J. Super. Ct. 1963); People v. Esposito, 201 N.Y.S.2d 83 (Queens Co. Ct. 1960); *see* Note, *Extending the Smith v. Hooey Duty to the Holding Jurisdiction*, 23 ME. L. REV. 201 (1971).

141. *Detainer System, supra* note 23, at 554-55; *Convicts, supra* note 69, at 867; *Detainers, supra* note 10, at 437. One writer has suggested that a "uniform prison administrative system" should be devised to *require* inmates to come to an early decision on whether to demand trial. *Convict's Right, supra* note 17, at 363.

142. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 3.1 (Approved Draft 1968).

in the future, the inmate, in order to obtain a prompt trial, must demand it.[143]

2. The Post-*Barker* Argument

The ABA standard contemplates that the detainer statutes, perhaps with appropriate friendly amendments, will and should continue to govern cases involving outstanding criminal charges pending against prison inmates. That view is open to question. The development of the sixth amendment right to a speedy trial has passed the detainer statutes by; the problems run too deep for amendment to be effective. While they may have been sound enactments in 1957 when they were proposed to address the administrative difficulties surrounding the detainer system, in 1975 they can no longer withstand careful scrutiny. Particularly in light of the Court's rejection of the demand-waiver doctrine in *Barker v. Wingo*,[144] it cannot be maintained that a prosecutor's responsibility to bring about the prompt trial of a prison inmate differs materially from his responsibility in any other case. To the extent they proceed upon an assumption that is no longer tenable and embody a constitutional principle that is no longer viable, the detainer statutes in their present form can only contribute to an essentially unconstitutional state of affairs. Accordingly, legislation similar to that proposed in the concluding section of this Article should be enacted.

Turning first to the Uniform Mandatory Disposition of Detainers Act, it is at once clear that the demand-waiver doctrine is woven deeply into the fabric of the statute. Indeed, the Act assumes that the prosecutor has no responsibility to proceed to trial expeditiously and that, instead, he may only lodge a detainer or do nothing at all until the inmate is released after serving his present term. The Act assumes that the inmate must demand trial and only seeks to put teeth into that demand. The ABA standard takes account of the possibility that the prosecutor will not lodge a detainer and requires him to do so. But still the assumption that notice to the inmate will suffice persists. The ABA standard merely assures that the demand rule can operate. However, now that *Barker* has rejected the demand-waiver doctrine, it is questionable whether a legislative enactment that so clearly embodies it can stand.[145]

143. *Id.* See also the apparent approval indicated in Coleman v. United States, 442 F.2d 150, 156 n.16 (D.C. Cir. 1971).

144. 407 U.S. 514 (1972).

145. In view of the Supreme Court's speedy trial decisions, principally *Barker*, a num-

The prosecutor, acting on his own or following the ABA standard, may lodge a detainer against an inmate and wait to see whether the prisoner will invoke the detainer statute to bring about trial. If the inmate promptly files a request for final disposition and trial is commenced within the specified time period, no constitutional question will arise.[146] But what of the case in which the prisoner declines to make a request? The question is whether the prosecutor, by lodging a detainer as is contemplated by the Uniform Act, can successfully shift the burden of bringing the case to trial to the accused. On first blush, *Barker* seems to give a negative answer. The state has the responsibility to afford the inmate a prompt trial, and, if the prosecutor delays, the balancing test is triggered. On the other hand, the existence of a statute which clearly authorizes the prosecutor to do just what he is doing may have some effect on the outcome under the balancing test. In this case, the Uniform Act provides the accused with a simple and efficient mechanism for bringing about trial if he so desires. Moreover, *Barker* recognized that a defendant's failure to demand trial is still an important factor to be considered in a speedy trial case.[147] Finally, *Barker* premised its rejection of the demand-waiver doctrine on the view that it is inconsistent with the rule followed in cases involving the waiver of other constitutional rights. Nothing in *Barker* suggests that, if the normal test for constitutional waiver is met, the right to a speedy trial may not be waived.[148]

The argument in the prisoner's behalf is straightforward. *Barker*

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ber of state courts have taken a fresh look at the interpretations placed on their speedy trial statutes. In order to avoid constitutional implications, some courts have overruled prior decisions construing such statutes to require the accused to demand trial. *E.g.*, Holland v. State, 480 S.W.2d 597 (Ark. 1972).

146. An underlying assumption here is that the *Barker* constitutional test does not require trial prior to the expiration of the time period prescribed in the Uniform Act. *Cf.* Sykes v. Superior Court, 9 Cal. 3d 83, 91 n.9, 507 P.2d 90, 96 n.9, 106 Cal. Rptr. 786, 792 n.9 (1973).

147. See text accompanying note 113 *supra.*

148. It is important to distinguish the significance *Barker* attached to a defendant's failure to demand trial and the concept of waiver. It is not that in some cases a defendant's failure to assert his right is so important a factor in the balancing test that a waiver may be found. Rather, *Barker* squarely held that waiver may never be found on the basis of the defendant's silence alone. *Barker* permits consideration of the defendant's failure to demand trial in order to take account of the possibility that delay may, in fact, work to the accused's advantage and that silence may indicate that the delay has not prejudiced the defendant's case. Waiver is another issue altogether and must be judged on the ordinary constitutional standard set forth in Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See* Clark v. Oliver, 346 F. Supp. 1345, 1350 (E.D. Va. 1972); text accompanying notes 152-57 *infra.*

firmly rejected the demand-waiver doctrine and placed the responsibility for implementing the accused's right to a speedy trial on the state. The Uniform Act embodies the demand rule and consequently encourages a prosecutor to disregard *Barker* and to put a prison inmate in just the untenable position the *Barker* Court described. The Act is an express statement by the state legislature that prison inmates are somehow different, that their cases are controlled by the demand rule, *Barker* notwithstanding. That, of course, is not the case; recent decisions agree that *Barker* applies to prisoners with outstanding criminal charges.[149] It is insignificant that the Uniform Act provides for notification of the inmate, so that he can choose to request trial. The point is that he has no obligation to do so in order to protect his constitutional right.[150] The detainer statute is, in effect, only a codified demand rule with sanctions against the state. It takes no account of present constitutional doctrine, but, instead, contemplates and encourages the application of doctrine now rejected.[151]

Nor can a prison inmate's failure to make a request for trial be considered a waiver of his right to a speedy trial, following the test laid down for the waiver of other constitutional guarantees.[152] *Barker* disapproved the demand-waiver doctrine in part because it assumes waiver from a silent record. In other cases, the Court has defined a waiver of constitutional rights as an intentional relinquishment or abandonment of a known right.[153] Consistently, the Court has re-

149. *E.g.*, Moore v. Arizona, 414 U.S. 25 (1973); Prince v. Bailey, 464 F.2d 544, 545 n.1 (5th Cir. 1972); Leonard v. Vance, 349 F. Supp. 859, 862 (S.D. Tex. 1972); Commonwealth v. Hamilton, 297 A.2d 127, 128 (Pa. 1972); State v. Starnes, 200 N.W.2d 244, 248 (S.D. 1972).

150. In point of fact, even prior to *Barker* a few courts had held that the demand rule did not apply to a prison inmate who failed to assert his right to a speedy trial. The situation of a prisoner unaided by counsel and perhaps unaware of the pending prosecution was considered a rare exception to the demand-waiver doctrine. *See, e.g.*, Murray v. Wainwright, 450 F.2d 465, 469-70 (5th Cir. 1971) (prisoner's failure to invoke the Florida version of the Uniform Act not a waiver); *Ex parte* State *ex rel.* Attorney General, 52 So. 2d 158 (Ala. 1951); Fulton v. State, 12 S.W.2d 777 (Ark. 1929); Arrowsmith v. State, 175 S.W. 545 (Tenn. 1915); *but see* United States v. DeTienne, 468 F.2d 151, 157 (7th Cir. 1972), *cert. denied*, 410 U.S. 911 (1973) ("experienced" inmate held to have known he had a right to a speedy trial); McCrory v. Cook, 329 F. Supp. 83, 89 (N.D. Miss. 1971) (prisoner who was represented by counsel waived right to speedy trial by failing to make a demand).

151. *E.g.*, Fells v. Kansas, 343 F. Supp. 678, 680 (D. Kan. 1972) (requiring a state prisoner to exhaust his remedies under the Agreement on Detainers—that is, to demand trial—before applying for federal habeas corpus relief).

152. *See* notes 110-11 *supra* and accompanying text; *cf.* note 148 *supra.*

153. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); *see generally* the discussion in Schneckloth v. Bustamonte, 412 U.S. 218, 235-42 (1973).

quired the accused to act affirmatively, with full knowledge and understanding of the consequences, in order to effectively waive constitutional protections. To this end, the assistance of counsel may be required.[154] In many cases, a hearing is necessary to fully apprise the accused of what is at stake, and a record must be kept to permit judicial review.[155]

Accordingly, if the Uniform Act is to be defended on the ground that an inmate's failure to request trial within the context of the Act is a valid waiver of his constitutional right to a speedy trial, it must be established that the Act provides a procedure that satisfies the normal test for constitutional waiver. Any such argument must fail. The Act requires the custodian to apprise the inmate of the source and nature of the outstanding charge. But the statute establishes no definite procedure for informing the prisoner of his options and the consequences that may follow from any particular course of action. Moreover, the question put—whether to seek prompt trial—calls for a tactical decision that should take into account the possibility of negotiation with the prosecutor, an assessment of the evidence, and the likelihood of conviction and sentence if the case goes to trial. Thus, in a real sense, the prison inmate is in need of counsel to advise him,[156] yet nothing in the Uniform Act requires more than simple notice. Certainly the Act does not contemplate a hearing or a record of the information made available to the inmate. Consequently, an inmate's failure to invoke the Act's machinery by requesting trial can hardly be considered the sort of voluntary and intelligent decision necessary to sustain a waiver of his constitutional right to be tried promptly.[157]

154. *Cf.* Miranda v. Arizona, 384 U.S. 436 (1966) (counsel needed to protect privilege against self-incrimination).

155. *Cf.* Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea proceeding).

156. See Clark v. Oliver, 346 F. Supp. 1345, 1350 (E.D. Va. 1972); *see generally* Jacob & Sharma, *supra* note 21, at 578-89.

157. Waiver of the right to a speedy trial is not to be governed by the relaxed standard of voluntariness adopted in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), for consent searches. In *Schneckloth*, the Court held that the police need not expressly tell a suspect that he may withhold consent to an investigative search; so long as he gives consent voluntarily, the search does not violate the fourth amendment. The Court recognized the difficulty in imposing finely-tuned procedural guidelines on police investigations in the field. However, at a later stage in a criminal prosecution, more stringent safeguards are necessary to protect a defendant's constitutional rights. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (suspect must be informed of right to remain silent and to have counsel present during custodial questioning). Particularly after formal charge, an accused is entitled to precise procedure. *Cf.* Kirby v. Illinois, 406 U.S. 682

The Agreement on Detainers suffers from the same malady. Like the Uniform Act, the Agreement assumes that the prosecutor need not move to bring a prison inmate to trial in an expeditious manner. Instead, he may lodge a detainer and leave it to the inmate to bring about trial by requesting final disposition of the charge under Article III. The argument need not be restated. The point is that the statute sanctions a prosecutorial practice that is at odds with the doctrine announced in *Barker*. The Agreement purports to retain the demand-waiver rule for cases involving prison inmates, without establishing a procedure which satisfies the test for constitutional waiver. Essentially the same analysis applies to the procedure under Article IV of the Agreement, whereby an out-of-state prosecutor is authorized but not required to seek temporary custody of an inmate for trial. Article IV assumes that the prosecutor has no constitutional duty to bring the inmate to trial and only provides a mechanism which may be employed if the prosecutor chooses to move forward. After *Smith v. Hooey*,[158] however, it is clear that a diligent, good faith effort must be made to gain temporary custody of the prisoner. Yet the Article IV time period begins to run only after the prosecutor has obtained custody of the inmate and returned him to the receiving state. Nothing in Article IV requires the prosecutor to initiate that process. If the inmate is to be assured of invoking a fixed time period within which trial must be commenced, he must initiate the process himself by requesting final disposition under Article III. Once again, the statute effectively requires the accused to bring himself to trial.[159]

B. The Equal Protection Challenge

While the relationship of the detainer system and the constitutional right to a speedy trial has received some attention from the commentators and in the courts, the equal protection aspects of the matter have been largely ignored. Yet it is quite clear that an equal protection argument can be constructed. The development of the right to a speedy trial and the extension of that right to prison inmates gives rise to the question whether a state may validly distinguish between one

(1972) (right to counsel at post-indictment lineup). In point of fact, *Schneckloth* expressly distinguished *Barker* as involving the question of waiver of a right which is guaranteed by the Constitution to preserve a fair trial, rather than a right which limits police investigations. 412 U.S. at 237.

158. 393 U.S. 374 (1969); see text accompanying notes 87-89 *supra*.

159. *Cf.* People v. MacDonald, 27 Cal. App. 3d 508, 103 Cal. Rptr. 726 (1972) (Stephens, J., dissenting) (viewing the filing of a detainer inadequate under *Barker*).

class of criminal defendants, those already in prison, and other defendants, those free on bail or held in a local jail pending trial. States that have statutes which implement the right to a speedy trial typically apply them only to defendants not already incarcerated, leaving inmates' cases to be governed by the detainer statutes.[160] To the extent the treatment of non-inmate defendants under a general speedy trial statute differs materially from that afforded prisoners under the detainer statutes, the constitutional validity of the statutory classification is drawn into question.

This section will examine the speedy trial statute and the detainer statutes in one state—California—in an effort to build an equal protection argument against retention of the detainer statutes in their present form. The same sort of analysis in another state may arrive at a different conclusion. The strength of an equal protection challenge depends upon the specific provisions of the statutes under examination. In those states with weak speedy trial statutes or none at all, the detainer statutes may be less vulnerable. The examination of the situation in California is intended only to demonstrate that a significant equal protection issue may exist and that state legislatures and courts should be prepared to deal with the problem.

Article I of the California constitution guarantees the accused in a criminal case the right to a speedy trial,[161] and, from the outset, the California Legislature has sought to implement that right by statute.[162] Section 1382 of the Penal Code provides that, unless good cause for delay is shown, a trial court must dismiss a criminal action if an information is not filed within fifteen days after the accused is arrested or trial is not commenced within sixty days after the filing of an indictment or information.[163] Trial may be set for a date beyond the sixty-

160. *E.g.*, State v. Brooks, 479 P.2d 893 (Kan. 1971). The New York speedy trial tatute specifically excludes from coverage "any defendant who is serving a term of imprisonment for another offense." N.Y. CRIM. PRO. LAW § 30.30(3)(c)(i) (McKinney Supp. 1973).

161. Specifically, the constitutional provision reads as follows:

> In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial . . . .

CAL. CONST. art. I, § 13, cl. 1. The state constitutional provision has been held to reflect both the letter and the spirit of the similar language in the sixth amendment. People v. Crittenden, 93 Cal. App. 2d 871, 209 P.2d 161 (Super. Ct. App. Dep't 1949).

162. CAL. PENAL CODE § 1382 (West Supp. 1974).

163. Specifically, section 1382 provides as follows:

> The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:
>
> 1. When a person has been held to answer for a public offense and an infor-

day period if the defendant consents to the delay, so long as the trial is actually commenced on that day or within ten days thereafter. However, the statute precludes inferring consent to delay from the defendant's silence, unless he is represented by counsel or the court explains his rights.

California was also one of the first states to adopt a statute similar to the Uniform Mandatory Disposition of Detainers Act. Indeed, the draftsmen of the Uniform Act borrowed freely from the California statute, now section 1381 of the Penal Code.[164] The statute requires the prosecutor having responsibility for the case to bring a prison inmate to trial within ninety days after the inmate delivers to the prosecutor a written notice of his whereabouts and a request for trial.[165] A con-

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mation is not filed against him within 15 days thereafter.

2. When a defendant is not brought to trial in a superior court within 60 days after the finding of the indictment or filing of the information . . . except that an action shall not be dismissed under this subdivision if it is set for trial on a date beyond the 60-day period at the request of the defendant or with his consent, express or implied, or because of his neglect or failure to appear and if the defendant is brought to trial on the date so set for his trial or within 10 days thereafter.

. . . .

If the defendant is not represented by counsel, he shall not be deemed under this section to have consented to the date for his trial unless the court has explained to him his rights under this section and the effect of his consent.

CAL. PENAL CODE § 1382 (West Supp. 1974).

164. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1959, at 167-69 (1958).

165. Specifically, section 1381 provides, in pertinent part, as follows:

Whenever a defendant has been convicted, in any court of this state, of the commission of a felony or misdemeanor and has been sentenced to and has entered upon a term of imprisonment in a state prison . . . and at the time of the entry upon such term of imprisonment . . . there is pending, in any court of this state, any other indictment, information, complaint, or any criminal proceeding wherein the defendant remains to be sentenced, the district attorney of the county in which such matters are pending shall bring the same defendant to trial or for sentencing within 90 days after such person shall have delivered to said district attorney written notice of the place of his imprisonment or commitment and his desire to be brought to trial or for sentencing unless a continuance beyond said 90 days is requested or consented to by such person, in open court, and such request or consent entered upon the minutes of the court in which event the 90-day period herein provided for shall commence to run anew from the date to which such consent or request continued the trial or sentencing. In the event that the defendant is not brought to trial or for sentencing within the 90 days herein provided the court in which such charge or sentencing is pending must, on motion or suggestion of the district attorney, or of the defendant, . . . or on its own motion, dismiss such action. If a charge is filed against a person during the time such person is serving a sentence in any state prison . . . of this state . . . it is hereby made mandatory upon the district attorney of the county in which such charge is filed to bring the same to trial within 90 days after said person shall have delivered to said district attorney written notice of the place of his imprisonment or commitment and his desire to be brought to trial upon said charge, unless a continuance is requested or consented to by such person, in open court, and such request or consent entered upon the minutes of the court, in which event the 90-day period herein provided for shall commence to run anew from the date to which such request or consent con-

tinuance beyond the ninety-day period may be granted only if the accused consents in open court and his consent is entered in the record. Finally, California has adopted the Agreement on Detainers in section 1389 of the Penal Code.[166]

1. The Intrastate Argument

Turning first to the intrastate situation, the broad question in equal protection terms is whether sections 1381 and 1382 establish a classification that "rationally furthers a legitimate state purpose or interest."[167] At the outset, it is clear that a classification does exist. Section 1381 does not apply to all California defendants, but only to prison inmates against whom outstanding criminal charges are pending. Section 1382, on the other hand, applies to persons charged with crime other than prison inmates. Of course, the equal protection clause does not bar all classifications, but only those that fail to include all persons who are similarly situated with respect to the legislative purpose.[168] Thus the initial task is to identify the purpose or purposes of the California statutes and then to ask whether the classification of inmate and non-inmate criminal defendants is rationally related to the state's objectives.[169]

It has been held that the purpose of section 1382, the California speedy trial statute, is to implement the state constitutional right to a speedy trial.[170] Section 1381, the California version of the Uniform Mandatory Disposition of Detainers Act, has as its purpose the resolution of the administrative problems associated with detainers based

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tinued the trial. In the event such action is not brought to trial within the 90 days as herein provided the court in which such action is pending must, on motion or suggestion of the district attorney, or of the defendant . . . or on its own motion, dismiss such charge. . . .

CAL. PENAL CODE § 1381 (West 1972).

166. See text accompanying notes 53-76 *supra*. California has also adopted a special statute to govern cases in which a federal prisoner is charged with a state offense in California. Since the statute follows the pattern established by the Agreement, it need not be examined separately. CAL. PENAL CODE § 1381.5 (West 1972).

167. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); *see generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter cited as *Developments*]. Inasmuch as state statutes are challenged directly and no private conduct is involved, the fourteenth amendment requirement of state action is clearly satisfied. *See* Strauder v. West Virginia, 100 U.S. 303 (1879).

168. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); *see* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).

169. *Developments, supra* note 167, at 1077-87.

170. Sykes v. Superior Court, 9 Cal. 3d 83, 507 P.2d 90, 106 Cal. Rptr. 786 (1973).

upon untried criminal charges. The objectives of the two statutes are by no means inconsistent; indeed, both may be achieved by assuring that the trial of criminal cases is not delayed beyond a fixed time period. The detainer statute's objective of clearing up detainers thus blends with and is consumed by the overriding concern of section 1382—prompt trial for persons accused of crime.[171]

The next step in assessing the validity of the classification established by sections 1381 and 1382 is to ask whether "all and only those persons similarly situated with respect to the purpose of the law are included in it."[172] The answer must be no. The classification scheme suffers from under-inclusion: section 1382 confers a benefit upon those criminal defendants to whom it applies but fails to confer the same benefit upon others who are similarly situated.[173] Inmates are left out of section 1382 altogether; their cases are controlled by section 1381. Yet the cases essentially hold that a defendant's status as a prisoner serving a present sentence does not detract from his interest in obtaining a prompt trial on an outstanding charge. While it is true that an inmate's incarceration is not due to the pendency of the new prosecution, he suffers from delay in numerous other ways, so much so that the Supreme Court has said that an inmate needs the protection of the speedy trial guarantee even more than do other defendants.[174] Under the circumstances, the conclusion which must be reached is that prison inmates occupy the same position with respect to prompt trial as do other persons accused of crime.

If the two provisions afforded identical treatment to the persons to whom they apply, no constitutional issue would be presented. However, the treatment afforded is quite different. Under section 1382, persons charged with crime are under no obligation to demand that they be brought to trial. The statutory time limits go into effect immediately upon arrest or formal charge, thus assuring prompt trial. The time limits are fixed and may be disregarded only with the defendant's consent or on a showing of good cause. Prison inmates proceeding under section 1381, however, must demand trial in order to trigger the statutory time limit. Even then, the time period does not

171. *Cf.* People v. Jacobs, 27 Cal. App. 3d 246, 259, 103 Cal. Rptr. 536, 544 (1972) ("both sections 1381 and 1382 have the objective of protecting the accused from having charges pending against him for an undue length of time").

172. *Developments, supra* note 167, at 1082.

173. *Id.* at 1084.

174. *See* text accompanying note 88 *supra.*

begin to run until the prosecutor receives the prisoner's written request. Given the grave constitutional questions involved in effectively requiring an accused to bring himself to trial, it can hardly be argued that imposing a demand rule upon prison inmates is not significantly different treatment.

In addition, the statutory time limits fixed for non-inmate prosecutions pursuant to section 1382 are substantially shorter than that prescribed by section 1381. Assuming the accused does not consent to delay and the state makes no special showing, section 1382 requires that a person be released or formally charged within fifteen days after he is arrested, and he must be brought to trial within sixty days after the date an indictment is found or an information filed.[175] On the other hand, section 1381 allows a ninety-day delay and measures that time period from the date of receipt of the prisoner's demand for trial, not the date of arrest or formal charge.[176] The result is that in most cases trials of prison inmates may be delayed considerably longer than the trials of non-inmate defendants.[177]

2. The "New Equal Protection" Standard

Thus far the equal protection challenge to sections 1381 and 1382 has been couched in terms of the "old equal protection," which requires only that a classification established by state legislation be ra-

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175. *See* note 163 *supra* and accompanying text.

176. *See* note 165 *supra* and accompanying text; *see also In re* Mugica, 69 Cal. 2d 516, 446 P.2d 525, 72 Cal. Rptr. 645 (1968) (rejecting the view that the filing of a detainer constitutes an arrest).

177. The analysis in the text proceeds on the assumption that the traditional, rational basis test under the equal protection clause is the appropriate constitutional standard. In the past, the Supreme Court has hesitated to strike down legislation under that relaxed test. On the other hand, in view of the new life breathed into the traditional standard in recent years, *see* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-21 (1972), there is reason to believe that the Court would invalidate the classification established by sections 1381 and 1382 if the question were presented in an appropriate case. For an exploration of the Burger Court's development of an enhanced version of the rationality test, see Yackle, *Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 U. RICHMOND L. REV. — (1975) [hereinafter cited as Yackle]. The thesis of that Article is that the Burger Court has adopted an intermediate standard of review in equal protection cases not subjected to strict scrutiny (see notes 178-95 *infra* and accompanying text) and that the emerging standard approximates the test for fundamental fairness under the due process clause.

tionally related to a legitimate state purpose.[178] It has been suggested that the California statutes fail the traditional test, particularly in light of the apparent new life breathed into that standard in recent years.[179] Additionally, however, it should be noted that an arguable case can be made that the California statutes should be judged on the more stringent standard associated with the "new equal protection." The Supreme Court has strictly scrutinized state classifications that interfere with fundamental interests and has held that such classifications must be shown to be necessary to some overriding and compelling state interest.[180] Fundamental interests have been defined, in turn, as "rights explicitly or implicitly guaranteed by the Constitution."[181] Since the right to a speedy trial springs from the sixth amendment as it applies to the states through the fourteenth,[182] it can be argued that the classification established by sections 1381 and 1382 interferes with a fundamental interest—the right to a speedy trial—and therefore must be measured against the strict scrutiny standard.[183]

The difficulty with this view is that, while a state statute may be designed to effectuate the right to a speedy trial, rarely does a court consider such a statute coextensive with a similar constitutional provision, so that a violation of the statute is itself of constitutional significance.[184] And only in that situation is one justified in saying that an underinclusive classification which denies the protection of a statute to persons who logically should have its benefits *per se* interferes with the constitutional guarantee as well. The relationship between the

178. *E.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

179. *See* Yackle, *supra* note 177.

180. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote).

181. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

182. Klopfer v. North Carolina, 386 U.S. 213 (1967); *see* notes 81-83 *supra* and accompanying text.

183. In point of fact, it can be argued that any classification that touches upon a defendant's rights in the criminal process is subject to the strict scrutiny test. *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956); *but see* Marshall v. United States, 414 U.S. 417 (1974).

184. *E.g.*, State v. Brann, 292 A.2d 173, 184-85 n.16 (Me. 1972). Although the Virginia court had held earlier, in Flanary v. Commonwealth, 35 S.E.2d 135 (Va. 1945), that the Virginia speedy trial statute is a legislative definition of what constitutes a speedy trial in the constitutional sense, the federal court in Delph v. Slayton, 343 F. Supp. 449 (W.D. Va. 1972), held that an interpretation of the sixth amendment cannot be controlled by a state legislative enactment. *See* Edwards v. State, 295 A.2d 811 (Md. Ct. Spec. App. 1972) (the 180-day time period prescribed by the Agreement on Detainers is not a constitutional standard).

California statutes and the constitutional right to a speedy trial is left ambiguous by the cases. The California Supreme Court has recently said that section 1382 constitutes a legislative determination that a trial delayed more than sixty days is *prima facie* in violation of a defendant's constitutional right.[185] And, in a case involving a prison inmate, a lower court seemed to read the detainer statute into constitutional significance, saying: "Whatever rights to a speedy trial appellant may have had were governed by Penal Code section 1381."[186] While these comments suggest that the California statutes are, in fact, coextensive with the constitutional right to a speedy trial, there is language in other cases tending to separate the statutory and constitutional standards.[187]

Additionally, it is critical that the state statutes are deemed coextensive, not just with the speedy trial provision of the state constitution, but with the sixth amendment. The strict scrutiny test under the equal protection clause of the fourteenth amendment is a *federal* standard applied when a *federal* constitutional right is threatened. If sections 1381 and 1382 refer only to a *state* constitutional guarantee, and that state right is something different from the federal right, then no fundamental interest is involved and there is no obligation to apply the strict scrutiny test. Of course, if the California Supreme Court were to adopt federal equal protection doctrine for use in interpreting the equal protection provisions in the *state* constitution,[188] the strict scrutiny test might still be applicable. Thus the state court might hold that, in applying the state equal protection guarantee, it will strictly scrutinize a classification that interferes with the exercise of a fundamental interest—a right guaranteed by the state constitution.

It is clear that the California courts consider sections 1381 and 1382 to have reference only to the state constitutional right to a speedy trial.[189] No federal sixth amendment issue and therefore no funda-

185. Sykes v. Superior Court, 9 Cal. 3d 83, 507 P.2d 90, 106 Cal. Rptr. 786 (1973); *see also In re* Vaca, 125 Cal. App. 2d 751, 271 P.2d 162 (1954) (linking the 60-day period in section 1382 with the state constitution).

186. People v. Ragsdale, 177 Cal. App. 2d 676, 678, 2 Cal. Rptr. 640, 641 (1960).

187. *See* People v. Rowden, 268 Cal. App. 2d 868, 873-74, 74 Cal. Rptr. 448, 451-52 (1969).

188. CAL. CONST. art. I, §§ 11, 21.

189. See Sykes v. Superior Court, 9 Cal. 3d 83, 507 P.2d 90, 106 Cal. Rptr. 786 (1973) (indicating that section 1382 implements the state constitutional right to a speedy trial and rejecting the *Barker* balancing test as inapplicable to the interpretation of the state provision).

mental interest is normally implicated.[190] Accordingly, a court examining the California statutes' validity under the federal equal protection clause is not obligated to apply the strict scrutiny test. On the other hand, the California cases indicate that a California court may nevertheless apply the strict scrutiny standard under its own state equal protection guarantee.[191] Pertinent provisions of the state constitution have been interpreted to be substantially equivalent to the equal protection clause of the fourteenth amendment,[192] and, in cases involving classifications that interfere with the exercise of a fundamental interest, the California court has employed the strict scrutiny test.[193] Assuming that the state constitutional right to a speedy trial is a fundamental interest in the context of state equal protection doctrine,[194] the strict scrutiny standard would seem appropriate in a case involving an equal protection challenge to the classification established by sections 1381 and 1382.[195]

The upshot is this. The case against the classification of inmate and non-inmate defendants is strong under the traditional, rational basis test. Moreover, even if the statutes can withstand a challenge based on the traditional standard, an argument can be made that the more stringent strict scrutiny test is applicable, because the classification touches upon a fundamental interest. It has been seen that the latter

190. The proposition in the text assumes that the state statutes, together with the state constitutional guarantee, require trial prior to the date on which a court applying the *Barker* balancing test would dismiss for want of a speedy trial under the sixth amendment.

191. See note 188 *supra.*

192. Department of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

193. *E.g.*, Serrano v. Priest, 5 Cal. 3d 584, 596 n.11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11 (1971) (right to education); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 17, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971) (right to pursue a lawful profession).

194. The California court *has* referred to the state constitutional right to a speedy trial as "fundamental." People v. Godlewski, 22 Cal. 2d 677, 682, 140 P.2d 381, 384 (1943).

195. It is worth repeating that the argument presented in the text proceeds on the assumption that the California statutes are coextensive with the state constitutional right to a speedy trial. The validity of that assumption is open to some doubt. If the California court were to hold that the state constitutional right to a speedy trial is implicated only long after the expiration of the statutory time limits, it would follow that the classification established by sections 1381 and 1382 denies to prison inmates the benefit of a short statutory time limit but not the constitutional right to be tried promptly. Accordingly, no fundamental interest would be infringed, and the strict scrutiny test would be inapplicable.

argument may well require an examination of state constitutional doctrine. In California, the argument may be successful, but in other states different doctrines may compel rejection of the strict scrutiny standard.

3. *People v. Jacobs*

The constitutional validity of the classification established by sections 1381 and 1382 has been challenged. In *People v. Jacobs*,[196] a prison inmate contended that his prosecution should have been dismissed under section 1382 because post-indictment delay had exceeded sixty days. That argument was rejected on the ground that section 1382 was inapplicable to a case involving a prison inmate and that, instead, section 1381 controlled. Since the inmate had not requested trial in order to trigger the ninety-day time period prescribed by that statute, he could not complain of the delay that occurred.

The *Jacobs* court attempted, albeit unsuccessfully, to demonstrate that inmates and non-inmates are not similarly situated. The court simply stated the obvious—that prisoners are already incarcerated while other defendants are free on bail or held in a local jail.[197] Two reasons were offered to show that this factual distinction justifies the different treatment given the two groups under sections 1381 and 1382. First, the court correctly observed that prison inmates cannot suffer imprisonment solely because of delay in the trial of a new charge.[198] While this is true, it is also true that an outstanding criminal charge can make an inmate's present term of confinement much more difficult to bear. Moreover, prisoners, too, have an interest in avoiding prolonged anxiety and the possibility that delay will impair the defense. The suggestion that prisoners' incarceration justifies different treatment under the California statutes is, then, unpersuasive.

The *Jacobs* court's second justification is even less compelling. The court noted that section 1381 gives a prison inmate the option of demanding trial within ninety days or waiting until after his present term is completed before seeking a resolution of the charge. A prisoner may prefer not to be tried while he is serving another sentence for fear that his convict status may prejudice his chances of acquittal.[199] Thus he may wish to forgo trial until he is released and can better

196. 27 Cal. App. 3d 246, 103 Cal. Rptr. 536 (1972).
197. *Id.* at 259, 103 Cal. Rptr. at 544.
198. *Id.*
199. *Id.*

participate in his own defense. The court apparently assumed that any benefit conferred on prisoners under section 1381, but not shared by other defendants under section 1382, constitutes support for the view that the classification established by the statutes is valid. The court's point is only the other side of the coin from the demand rule. Certainly, if a prisoner is required to demand trial under section 1381 in order to invoke the ninety-day time period, it follows that he is left with the option of choosing not to do so for tactical reasons. *Jacobs* merely pointed out the fact but failed to say why it is appropriate to give prisoners such an option while denying it to others. It remains to be demonstrated why prison inmates should be entitled to this option, instead of the usual opportunity afforded all criminal defendants to seek reasonable continuances.[200]

The conclusion that must be reached is that the *Jacobs* opinion faced but did not satisfactorily deal with the equal protection challenge to sections 1381 and 1382. The points made by the court in support of its decision upholding the classification fail to demonstrate that inmate and non-inmate criminal defendants are not similarly situated with respect to the purpose of the statutes. Accordingly, even when the court arguably succeeded in identifying one way in which prison inmates receive better rather than inferior treatment, the result only served to buttress the equal protection challenge. Hopefully, *Jacobs* is not the last word from a California court on this question. Future opinions should follow the line of analysis set forth in the preceding section of this Article and should conclude that the classification established by the California statutes is unconstitutional.[201]

200. The ABA standard also affords the prisoner this choice. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 3.1 (Approved Draft 1968). Like the *Jacobs* court, the standard fails to give reasons for maintaining inmates in a position different from that of other criminal defendants. See text accompanying note 143 *supra*.

201. There is reason to think that the result in *Jacobs* will be rejected. In Hayes v. Superior Court, 6 Cal. 3d 216, 490 P.2d 1137, 98 Cal. Rptr. 449 (1971), the California Supreme Court held that section 1203.2 of the Penal Code, which permits a California prisoner to request disposition of a probation matter in his absence, must be read to apply as well to prisoners confined in other states. The court said that the exclusion of out-of-state prisoners would constitute an irrational classification in violation of the equal protection clause. And, in Sykes v. Superior Court, 9 Cal. 3d 83, 507 P.2d 90, 106 Cal. Rptr. 786 (1973), the court, while still purporting to recognize that section 1382 does not apply to prison inmates, applied the sixty-day time limit to delay between an order upholding a collateral challenge and the commencement of a new trial. Although section 1382 does not by its terms govern such a case, the court said that the statute must be read to control in order to save it from an equal protection challenge.

4. The Interstate Argument

An equal protection challenge addressed to the classification of non-inmate defendants and inmate defendants in other states established by section 1382 and the Agreement on Detainers, section 1389, follows the analysis of the intrastate situation set forth above. Once again, it is clear that a classification exists, and the question is whether it rationally furthers a legitimate state purpose. The overriding purpose of the statutes is to assure the prompt trial of criminal cases. Now that *Smith v. Hooey*[202] has extended the sixth amendment right to a speedy trial to defendants serving prison terms in other jurisdictions, and *Barker v. Wingo*[203] has rejected the demand-waiver doctrine, there is no rational basis for the classification established by the California statutes. Yet Article III of the Agreement imposes the demand rule on the prisoners to whom it applies and then requires that trial be commenced six months after the inmate's request is received.[204] Defendants to whom section 1382 applies need not demand trial and are entitled to dismissal if trial is not commenced within sixty days following indictment.[205]

Without retracing the argument set forth above, this section will focus on the two principal ways in which cases involving out-of-state prisoners can be said to raise different questions. First, California has no power to compel another sovereign to give up temporary custody of a prison inmate in order that he may be brought to trial in California.[206] The sixth amendment requires only that the state make a "diligent, good faith effort" to obtain the sending state's cooperation in bringing such a prisoner to trial.[207] However, it does not follow that an out-of-state prisoner's status justifies the demand rule. The requirement that the inmate affirmatively act to bring about trial has no necessary bearing on California's ability to obtain the sending state's cooperation. Article III of the Agreement embodies the demand rule only because the draftsmen assumed it would remain accepted doctrine; the rule has no special significance for interjurisdictional relations. A better case can be made for the view that the dismissal sanction prescribed for violation of section 1382 is inappropriate in a case

202. 393 U.S. 374 (1969); see text accompanying notes 87-89 *supra.*
203. 407 U.S. 514 (1972); see text accompanying notes 99-114 *supra.*
204. See text accompanying notes 63-67 *supra.*
205. See note 163 *supra.*
206. See note 54 *supra* and accompanying text.
207. Smith v. Hooey, 393 U.S. 374, 383 (1969).

in which trial is delayed beyond sixty days because the sending state declines to deliver up the inmate. On the other hand, section 1382 permits a continuance on a showing of good cause.[208] In a case in which California's good faith effort is unsuccessful, the trial court can grant a continuance on a showing by the state that it is the sending state's intransigence that is at fault.

Prison inmates incarcerated in other states present a second issue which must be considered in the equal protection analysis. While it seems clear that most cases involving local defendants can be brought to trial within the sixty-day period prescribed in section 1382, it may be unrealistic to suppose that prisoners can be located, obtained from their keepers, churned through the interstate rendition process, and transported from a distant institution within the space of sixty days after formal charge. Accordingly, it can be argued that practicality demands special provision for interstate cases, and the consequent unequal treatment of out-of-state prisoners is reasonable within the meaning of the equal protection clause.[209] Here again, however, section 1382 takes account of the practical problems presented. If the state is unable to locate the accused after he is indicted, if the defendant is involved in the criminal process of another jurisdiction, if the procedure for obtaining temporary custody or rendition is unexpectedly time-consuming, or if the prisoner's transportation causes delay, it would seem that the state would be able to establish good cause for continuing the case beyond the sixty-day time period established by section 1382.[210]

208. See note 163 *supra* and accompanying text.

209. It has been suggested that the nationwide system for distributing information regarding criminal matters is sufficiently effective to justify placing the burden on a prosecutor to locate an accused soon after he is apprehended in another jurisdiction. Then, in order to avoid interference with that state's criminal process, the time period prescribed in the speedy trial statute should begin to run on the date the prisoner begins serving any new sentence in the sending state. *See Effective Guaranty, supra* note 21, at 776-77.

210. Article IV of the Agreement raises an additional equal protection problem. No account is taken of the inmate's rights under the Uniform Criminal Extradition Act, 9 UNIFORM LAWS ANN. 263-355 (1957), enacted in most states. It can be argued that Article IV establishes irrational discrimination between prisoners sought under the Agreement and those sought through ordinary rendition channels. In the latter cases, the Extradition Act provides for notice to the prisoner of the request for his custody and his right to counsel, a reasonable period within which to apply for a writ of habeas corpus, and a habeas corpus hearing. In contrast, prisoners sought under Article IV may not even learn of the request for custody until it is too late to petition the governor or a court for relief. *See* note 69 *supra*. The interstate rendition process is ignored. *See Convicts, supra* note 69, at 858. At least one court has attempted to resolve the

V. A Proposed Legislative Solution

Up to this point, this Article has been concerned with constructing a constitutional challenge to the detainer statutes. It has been argued that the statutes are inconsistent both with the sixth amendment right to a speedy trial and the equal protection clause of the fourteenth amendment. If the argument is accepted, the various state legislatures have the responsibility to revise their statutes so as to avoid infringing upon protected interests and to forestall judicial invalidation of the statutes. Additionally, there may be cases in which a court, applying the *Barker* balancing test, is unwilling to say that an inmate's constitutional right to a speedy trial has been violated. And, in some states, a court like *Jacobs* may find enough give and take between the detainer statutes and the general speedy trial statute to justify the classification of inmates and non-inmates they establish.[211] In those cases as well, state legislatures should face the question whether, as a matter of policy, the detainer statutes should be maintained as they are. Even if constitutional, the detainer statutes represent an out-dated and misdirected approach to the basic problem of affording prompt trials in criminal cases.

In this section legislative means for rationally dealing with the issues raised will be proposed. The suggested approach would establish and maintain a consistent theme of dealing with all persons accused of crime in a single statute, requiring trial within a fixed period of time after formal charge. Any practical difficulties which arise in cases involving prison inmates would be handled under the statute by permitting continuances for good cause. This approach turns the focus away from the administrative difficulties associated with detainers and toward the underlying problem of assuring that pending criminal charges do not remain outstanding for an undue period of time.

An essential ingredient in the suggested approach is a firm state policy against the filing or recognition of detainers based upon untried criminal charges. It was pointed out early in this Article that the detainer system developed as a consequence of the view that a prose-

conflict by reading the provisions of the Extradition Act into Article IV of the Agreement. *See* State *ex rel.* Garner v. Gray, 201 N.W.2d 163 (Wis. 1972). The amendments to the Agreement proposed later in the Appendix take the same approach.

211. *See, e.g.*, Morton v. Haynes, 332 F. Supp. 890, 893 (E.D. Mo. 1971) (equal protection not violated by a statute requiring faster trials in rural areas than in St. Louis); State v. Bruno, 107 So. 2d 9 (Fla. 1958) (equal protection not violated by state statute of limitations that was extended for holders of public office).

cutor's responsibility to bring a prison inmate to trial differs from his responsibility to defendants free on bond or in jail pending trial.[212] Now that that view has been rejected, the practice of lodging detainers in lieu of prosecution can no longer be justified. Instead, legislation should be adopted, requiring prosecutors to proceed against prison inmates just as they proceed against defendants who are not already incarcerated.

First, the general speedy trial statute should be amended to make it clearly applicable to prison inmates, irrespective of where they are confined. Once again, taking California as an example, section 1382 should be amended to include the following addition:

> 4. This section applies to all persons charged with criminal offenses within this state and includes persons who are already incarcerated, within this state or elsewhere, serving sentences imposed for other offenses.[213]

The proposed amendment would legislatively overrule the California cases which have held that section 1382 is inapplicable to prison inmates.[214] This done, section 1381, the California version of the Uniform Mandatory Disposition of Detainers Act, should be repealed. With prison inmates in California subject to the general speedy trial statute, there is no need for the process contemplated by the intrastate detainer statute.

In a like manner, any reference to detainers based on untried charges should be excised from section 1389, the Agreement on Detainers. The suggested additions to and deletions from the Agreement are set forth in the Appendix. In the first two Articles, it is proposed only to delete references to detainers. Article III is to be repealed entirely, because it embodies the demand rule and places the prisoner in the position of bringing himself to trial. Under the proposed approach, Article IV of the Agreement becomes the key provision, authorizing and encouraging interstate cooperation in expediting the criminal process. No longer is Article IV limited in operation only to those cases in which a detainer has been filed.[215] Instead, the prosecutor is expected to pursue every case with the same vigor and to decide quickly whether or not to bring an accused to trial. There is no longer a middle way—lodging a detainer. The last few lines of section (a) are deleted and

212. See text accompanying notes 77-79, 133-39 *supra*.

213. For the text of section 1382, see note 163 *supra*.

214. *See, e.g.*, People v. Godlewski, 22 Cal. 2d 677, 140 P.2d 381 (1943).

215. See note 63 *supra* and accompanying text.

the language in brackets substituted in order to square Article IV with the general statute governing interstate rendition.[216] The provision in section (b) for notification of other authorities in the receiving state, who have charges pending against the inmate, raises a problem under the proposed approach.[217] While it is possible to require the custodian to notify authorities that have lodged detainers, it is impractical to require notification of officials who have not contacted the institution. On the other hand, given the difficulty of moving potentially dangerous inmates about, every effort should be made to see that a prisoner is tried on all charges pending in the receiving state in the course of a single visit there. Inasmuch as the proposed approach abolishes the use of detainers in lieu of prosecution, the best that can be done is to require the custodian to notify officials he knows have charges pending against the inmate. Section (c) is no longer needed, because the sixty-day time period established by the general speedy trial statute controls all cases. Section (d) is also deleted in order to avoid conflict with ordinary interstate rendition procedure.

In Article V, the references to detainers and Article III in sections (a) and (b)(2) are deleted. Section (c) now contains the sanction for failing to bring the inmate to trial within the time limits provided in Articles III and IV. That language is deleted with the understanding that the dismissal sanction in the general speedy trial statute will apply.[218] The deletion of the reference to detainers in section (d) is only another change necessary to free Article IV from the requirement that a detainer be lodged. Finally, section (a) of Article VI is deleted with the view that it is subsumed under the provision for a continuance for good cause in the general speedy trial statute. The remaining provisions of the Agreement bear only upon the administrative procedure for transporting the prisoner to and from the trial court, with the usual concluding provision for liberal construction and separability. They require no amendment to be consistent with and, in fact, are quite necessary to the efficient operation of the proposed legislation.

It is appropriate to compare the proposed legislation with the con-

216. See notes 69 & 210 *supra.*

217. See text accompanying note 66 *supra.*

218. Dismissal should be with prejudice. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL § 4.1 (Approved Draft 1968). In a state like California, where a charge dismissed under the general speedy trial statute may be reinstituted, appropriate amendment will be necessary. To allow reinstatement of a charge would be to dilute rather than to strengthen the statutory protection now afforded prison inmates.

stitutional objections to existing law made in this Article. Turning first to the sixth amendment argument, the principal points are these: (1) The detainer statutes in their present form do not operate unless a detainer is lodged but fail to require prosecutors to contact the institution. Thus inmates are not protected against delay in prosecutions of which they are unaware;[219] (2) Even if the prosecutor is required to lodge a detainer under the ABA standard, the detainer statutes impose the demand rule upon prison inmates, without establishing a procedure that satisfies the test for constitutional waiver.[220]

The first objection to the detainer statutes has no application to the proposed legislation, which eliminates altogether the use of detainers representing untried charges. The proposed statute does not require that a person be notified of a prosecution pending against him. Instead, the prosecutor has the duty to move forward with the prosecution itself. The proposed statute answers the second objection by putting prisoners on equal footing with other defendants. Unless the inmate is represented by counsel or the court explains his rights to him, consent to delay beyond sixtydays cannot be inferred from mere acquiescence.[221] The proposed statute places the burden of bringing about the speedy trial of criminal cases squarely on the prosecutor's shoulders and thus is consistent with the letter and spirit of *Barker*.[222]

219. See text accompanying note 138 *supra*.

220. See text accompanying notes 158-59 *supra*.

221. See note 163 *supra*.

222. A third objection to the Agreement on speedy trial grounds is partially answered by the proposed legislation. While the detainer statutes operate only when a detainer has been lodged against an inmate, the ABA standard requires a prosecutor to file a detainer promptly after the prisoner is charged and his whereabouts become known. *See* text accompanying note 142 *supra*. In order to avoid a breach of the standard, a prosecutor may delay the indictment and thus postpone dealing with the case as long as the statute of limitations will allow. See note 139 *supra*. By placing the prison inmate in the same position as other defendants, the proposed statute would improve the situation considerably. A prosecutor would no longer be encouraged to delay charging a prisoner; the sanctions and responsibilities would be similar for inmates and non-inmates alike.

It would be difficult to draft a workable statute to deal with delay prior to indictment. Questions regarding the appropriate pace of criminal investigations and the amount of evidence needed to support a formal charge are best left to good faith law enforcement, guided by the prosecutor's office. If formal charge is delayed, the prosecutor's conduct is governed by the applicable statute of limitations and the due process clause. See text accompanying notes 97-98 *supra*. The proposed statute only removes any incentive to delay formal charge in prisoners' cases more than in others. Inasmuch as the proposed statute simultaneously relies on the statute of limitations to limit pre-charge delay and purports to govern prosecutions against prisoners confined in other states, it is necessary to examine the statute of limitations to assure that it is adequate for the purpose. Some

Turning to the equal protection challenge levelled against the detainer statutes, it has been argued that the Supreme Court's speedy trial decisions have made it clear that prison inmates accused of additional offenses occupy a position with respect to prompt trial similar to that occupied by other defendants.[223] Accordingly, classification and different treatment of inmates and non-inmates is irrational and amounts to invidious discrimination. The proposed statute responds to the argument by treating all cases in a single statute, requiring no demand for trial, and applying the same fixed time period for trial to all prosecutions, irrespective of the defendant's status. The statute does not expressly anticipate practical problems with cases involving inmates, but leaves open the possibility of a reasonable continuance in any case in which there is good cause for delay.[224] The result is that the proposed statutory scheme recognizes that all criminal defendants are similarly situated with respect to the legislative purpose—assuring prompt trial—and treats them accordingly.

statutes expressly exclude out-of-state prisoners from coverage while others have been construed to do so. See note 139 *supra*. In a state in which ambiguity exists, the legislature should amend the statute of limitations so as to bring out-of-state prisoners within its protection.

223. See text accompanying note 174 *supra*.

224. It is worth noting that, if in practice courts consistently and with little or no deliberation grant continuances in cases involving prisoners on the sole ground that practical problems result in delay, even the proposed statute may be subject to the charge that it is unconstitutional as applied. *Cf.* Finney v. Wainwright, 434 F.2d 1001, 1003 (5th Cir. 1970), *cert. denied*, 401 U.S. 962 (1971).

APPENDIX

Article I:

The party states find that charges outstanding against a prisoner, ~~detainers based on untried indictments, informations or complaints,~~ and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges ~~and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.~~ The party states also find that proceedings with reference to such charges ~~and detainers,~~ when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II:

As used in this agreement:

(a) "State" shall mean a state of the United States of America; a territory or possession of the United States; the District of Columbia; the commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that ~~he initiates a request for final disposition pursuant to Article III hereof or at the time that~~ a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to ~~Article III or~~ Article IV hereof.

Article III: (repealed)

Article IV:

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner ~~against whom he has lodged a detainer and~~ who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmit-

ted the request: and provided further that ~~there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner~~ [the provisions of the Uniform Criminal Extradition Act are complied with].

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who ~~have lodged detainers~~ [are known to have outstanding charges pending] against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) ~~In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.~~

(d) ~~Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.~~

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article V:

(a) In response to a request made under ~~Article III or~~ Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. ~~If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement.~~

In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint ~~on the basis of which the detainer has been lodged and~~ on the basis of which the request for temporary custody of the prisoner has been made.

(c) ~~If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.~~

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints ~~which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction.~~ Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and

custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

Article VI:

(a) ~~In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.~~

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Article VII: (no change)

Article VIII: (no change)

Article IX: (no change)